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No. 73-671

In the

Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Mayer Paving and Asphalt Company and Continental Illinois National Bank and Trust Company of Chicago, as Administrator of the Estate of Lee O. Mayer, deceased, respectfully pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 1, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, Mr. Justice Clark dissenting, is not yet reported but appears in the Appendix hereto (App. 1a). The opinions of the District Court for the Northern District of Illinois, Eastern Division, are unreported but also appear in the Appendix hereto (App. 23a, 27a, 33a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 1, 1973 (App. 23a). Petition for rehearing was not filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the commerce requirements of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, are met when an Illinois seller of crushed stone which is admittedly engaged in commerce and is admittedly discriminating in price in the course of such commerce sells stone to certain Illinois customers at substantially higher prices than those charged other competing Illinois customers and those charged Indiana customers.

2. Whether F.R.C.P. Rule 19(a)(2)(i) permits a person upon his own motion to inject himself into an action as a party defendant where the only jurisdictional ground relied upon is that the party has a "counterclaim" it alleges "is compulsory" even though plaintiff asserts no claim against the person and no other independent jurisdictional ground exists to support the alleged counterclaim.

STATUTES INVOLVED

The statutes involved are:

1. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, §1, 49 Stat. 1526, 15 U.S.C. §13(a), which in pertinent part provides:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." (Emphasis supplied).

2. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15 which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

3. Rule 19(a)(2)(i) of the Federal Rules of Civil Procedure which provides:

> "Rule 19. Joinder of Persons Needed for Just Adjudication.
>
> (a) Persons To Be Joined If Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if. . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest. . . ."

STATEMENT OF THE CASE

Mayer Paving and Asphalt Company, a corporation, and Lee O. Mayer, as surviving partner of Mayer Paving Company, a partnership, filed this action in 1969 pursuant to 15 U.S.C. §15 against respondent, General Dynamics Corporation, for treble damages based on defendant's sale of crushed limestone during the 1958-1968 period to Illinois and Indiana asphalt manufacturers and paving contractors, including petitioners, at discriminatory prices in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §13(a).[1] The complaint, as amended, sought damages for the entire period on the ground that General Dynamics Corporation had fraudulently concealed its price discrimination practices from plaintiffs.

Although the complaint named General Dynamics as the sole defendant, a General Dynamics' subsidiary,

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[1] During the appeal below, Lee O. Mayer died, and Continental Illinois National Bank and Trust Company of Chicago as Administrator was substituted in decedent's place and stead.

respondent Material Service Corporation, appended counterclaims for mortgage foreclosure and for the balances due on a promissory note and open account to General Dynamics' answer. Prior to December 31, 1959, Material Service was a separate corporate entity. On that date, General Dynamics by merger acquired the assets of Material Service and thereafter operated it as a division of General Dynamics until March 31, 1969, when Material Service was reincorporated.

The action was tried before a jury, which, after three weeks of testimony, rendered a verdict in favor of petitioner, Mayer Paving and Asphalt Company, and against General Dynamics Corporation. Judgment was entered on the jury verdict in the trebled amount of $498,204. During the course of the trial the District Court directed a verdict for General Dynamics on the issue of fraudulent concealment, thereby eliminating the partnership claim in its entirety and limiting Mayer Paving and Asphalt Company's corporate claim to the four-year period immediately preceding filing of the complaint. The District Court further directed a verdict in favor of Material Service Corporation and against petitioners in the amount of $359,849 on Material Service's counterclaims, having previously granted partial summary judgment on the issue of liability.[2]

General Dynamics thereafter filed its motion for judgment N.O.V. or alternatively for a new trial. The District

[2] The motion for partial summary judgment was opposed on the ground that the District Court was without jurisdiction of the counterclaims and further that the counterclaims were subject to the defense of recoupment to the extent petitioners' claims were barred by the statute of limitations. The Court below did not reach the fraudulent concealment, recoupment and directed verdict issues because of its ruling on the commerce issue (App. 11a).

Court granted judgment N.O.V. but subsequently denied the alternative new trial motion.

Judgment N.O.V. was granted solely and exclusively on the basis of the District Court's interpretation of the commerce provisions of Section 2(a) of the Clayton Act, as amended. In its memorandum opinion the Court acknowledged that General Dynamics did "substantial business in Indiana" as well as Illinois from its Chicago headquarters and Illinois quarries (App. 24a). Nevertheless, the Court concluded that the substantial price differences charged paving contractors within Illinois as well as like substantial price differences charged Illinois contractors (higher) as compared to Indiana contractors (lower) could not be compared in determining whether either or any of the discriminatory sales were in commerce. The District Court reached this conclusion reluctantly, stating (App. 26a):

> "If this case were one of first impression coming upon the heels of the *Moore* case, this court would not have made the distinction outlined above in determining whether jurisdiction existed under the 'in commerce' requirements of the act. This court would have found that a showing of substantial interstate sales of like goods is sufficient to satisfy the jurisdictional requirements.
>
> "This however is not a case of first impression and this court feels compelled to follow the holding in the *Borden* case. If the *Borden* case is not the law of this Circuit it is up to the Court of Appeals to say so."[3]

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[3] The reference to *Borden* is the decision of the Seventh Circuit in *Borden Company* v. *Federal Trade Commission,* 339 F.2d 953 (1964).

On appeal, the court below, Mr. Justice Clark dissenting, affirmed the judgments of the District Court on the ground that, although *Borden* was inapplicable, petitioners nevertheless had failed to establish the third commerce requirement of Section 2(a).

Both the majority opinion and that of Mr. Justice Clark in dissent were in substantial agreement with respect to the facts shown of record. Lee O. Mayer and her husband, Sidney R. Mayer, Sr. operated an asphalt paving business as a partnership until the latter's death in 1964. Prior to Mr. Mayer's death, the asphalt manufacturing facility, as opposed to the paving business, was operated by Mayer Paving and Asphalt Company, a corporation. Thereafter, the paving business was absorbed by the corporation. The Mayers engaged in the aphalt paving business during the entire 1958-1968 period and purchased substantially all of their crushed limestone requirements for paving as well as asphalt manufacture from General Dynamics Corporation. During the decade, Mayer's purchases from General Dynamics amounted to $5.4 million (App. 17a).

General Dynamics' Material Service Division operates five quarries, all located in Illinois. The Thornton quarry — perhaps the largest commercial quarry in the world — is located only a few miles from the Indiana border. As Mr. Justice Clark noted, the Thornton quarry was the nearest source of crushed limestone for contractors in the Northwest Indiana area, especially East Chicago, Hammond, Gary and nearby cities. During the 1958-1968 period General Dynamics' quarries produced between ten and twelve million tons of crushed limestone. In addition, General Dynamics maintained eleven distribution yards, including a yard at Gary, which supplied bulk aggregates, and a sales office at LaPorte, Indiana (App. 17a).

The record further shows that in 1968 total sales of products from General Dynamics' quarries to customers in Illinois and Indiana amounted to approximately twenty-nine million dollars. The four Indiana paving contractors who testified, alone purchased over $4.5 million of crushed limestone and other products from General Dynamics' Illinois quarry during the decade in question.

As the majority of the Court noted, the jury concluded that General Dynamics had been guilty of charging Mayer Paving higher prices for stone than it charged Mayer's paving competitors. Further, the jury was unconvinced by General Dynamics' alleged cost justification and other claimed defenses (App. 3a). Elaborating on the evidence of price discrimination, Mr. Justice Clark pointed out that the Indiana contractors, one of whom (A. Metz, Inc.) competed with Mayer, paid from 20¢ to 30¢ less per ton than General Dynamics was regularly charging Mayer. The Justice also noted that the record showed that General Dynamics favored Illinois customers in competition with Mayer and such customers were regularly charged between 10¢ and 47¢ per ton less than Mayer was forced to pay. The price discrimination proofs, as Mr. Justice Clark noted, "were uncontradicted at the trial" (App. 18a).

In reaching its decision, the majority of the Court did not quarrel with the jury, but concluded that it was "presented with a pure question of statutory interpretation" (App. 5a) concerning the commerce requirements contained in Section 2(a) which it held to entail three tests in order to establish jurisdiction (App. 4a):

> "[F]irst, the discriminator must be 'in commerce'; second, the challenged discrimination must occur 'in the course of such commerce'; and third, 'either or any of the purchases involved in such discrimination are in commerce. . . .'"

The majority conceded that the first two requirements were clearly met, but concluded that petitioners had failed to establish the third requirement. It did not dispute the fact that the Mayers had suffered severe discrimination in their purchases in comparison with their Illinois competitors but held that the substantially lower prices charged Indiana contractors could not be compared under the third commerce test because the Mayers were not effective competitors in the Northwest Indiana area.

Mr. Justice Clark vigorously dissented from the conclusion of the majority, stating that the interpretation "if finally sustained, . . . will operate as a repealer of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C., §13(a) (1970), and will severely restrict the holding in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954)" (App. 16a).

Mr. Justice Clark further stated (App. 18a):

> "It appears to me that a plain reading of §2(a) prohibits such discrimination. It provides that if '*either* or *any* of the purchases involved in such discrimination *are in commerce*' then all are prohibited. The majority interprets the all-inclusive phrase 'either or any' to apply to sales to Mayer only insofar as the presence of commerce is concerned. *Mead's Fine Bread* holds the opposite. Here the allegation and proof, uncontradicted, are that some local sales (from the same Illinois quarries) in Illinois as well as interstate ones to Indiana customers were at much lower prices than like sales to Mayer and other Illinois customers. I always thought that this was a practice that §2(a) was specifically intended to prohibit. . ."

Finally, Mr. Justice Clark squarely took issue with the majority's effort to distinguish *Moore* on the ground that it involved primary line competition rather than secondary line competition. "To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts" (App. 20a). In his view the original judgment in favor of Mayer Paving and Asphalt Company should have been reinstated.

ARGUMENT

I.

The Court Of Appeals For The Seventh Circuit Has Incorrectly Decided An Important Question Concerning The Commerce Provisions Of Section 2(a) Of The Clayton Act, As Amended, Which Should Be Settled By This Court.

The majority of the Court below has given the commerce provisions of Section 2(a) an interpretation which, if allowed to stand, will effectively preclude relief under that statute for local businessmen attempting to cope with price discrimination in the purchase of commodities from large size interstate sellers. This conclusion was not dictated by any defect in proof, but rather was deemed to follow as "a pure question of statutory interpretation" of the commerce provisions of Section 2(a). The majority regarded the question as one of "first impression" involving a statute where "'congressional intention is unusually difficult to decipher'" (App. 5a, 6a, 7a).

In our view, the conclusion reached below is completely inconsistent with the purpose of the Robinson-Patman Act amendments to Section 2 of the Clayton Act which were intended by Congress to expand rather than restrict the ability of local victims of price discrimination to obtain redress under the statute. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936). The words of Section 2(a), "where either or any of the purchases involved in such discrimination are in commerce", have now been flatly interpreted by the Seventh Circuit to mean that only purchases by actual competitors may be considered in determining whether this commerce prerequisite is met.

The result is that a large interstate seller of essential commodities may freely discriminate among local purchasers, charging substantially lower prices to some of such local competitors as well as to out-of-state customers, as long as the overcharged customer does not compete, or is effectively foreclosed from competing, outside the state.

The Seventh Circuit's interpretation of the commerce provisions of the statute finds no support in the congressional history surrounding adoption of the Robinson-Patman Act. Indeed, the Conference Committee Report on the Robinson-Patman Act, which rejected certain language contained in the House version of the bill making price discrimination unlawful by "any person, whether in commerce or not", states that such language was "omitted" because the Committee was of the opinion that the language of the Act as adopted "*already covers all discriminations, both interstate and intrastate, that lie within the limits of Federal authority.*" (Report of Conf. Committee, H.R. Rep. No. 2951, 74th Cong., 2d Sess. 1-9 (June 8, 1936) (Emphasis supplied).

We submit that neither the language of the commerce provisions of Section 2(a) nor the legislative history supports the construction of the Court below, a construction which will destroy any effective protection for local businessmen who are victims of otherwise illegal price discrimination.

II.

The Decision Of The Court Below Conflicts With The Unanimous Decision Of This Court In Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

We previously observed that the District Court submitted this case to the jury in the belief that the com-

merce principles here involved were indistinguishable from those applied by this Court in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). After the jury returned a verdict favorable to Mayer Paving and Asphalt Company and judgment was entered thereon, he nevertheless reluctantly granted judgment N.O.V. because, despite the decision of this Court in *Moore,* he felt obliged to follow the decision of the Seventh Circuit in *Borden Company* v. *FTC,* 339 F.2d 953 (7th Cir., 1964) the rationale of which the trial judge could not distinguish from the instant case.

It now appears from the opinion below that the majority did not consider its *Borden* decision as controlling and has attempted to distinguish *Moore* on grounds which constitute a *non-sequitur.*

In *Moore* the plaintiff was engaged in a bakery business at Santa Rosa, New Mexico, where it sold bakery products to customers in the local vicinity. Its business activities were purely intrastate in nature. The defendant Mead was similarly engaged in the baking business at Clovis, New Mexico. Mead, however, also sold its bakery products in Farwell, Texas, a border town served with a bread truck operating out of Clovis.

Defendant Mead initiated a price war in Santa Rosa through bread price reductions, but did not lower its bread prices in Farwell, Texas. Plaintiff recovered a treble damage judgment for injury of its business resulting from Mead's Santa Rosa price reduction, but the judgment was reversed by the Tenth Circuit on the sole ground that "competitive injury resulting from [defendant's] sale was to a purely local competitor whose business was in no way related to interstate commerce" (208 F.2d at p. 780).

On certiorari, this Court reversed on the ground that defendant's sales in Santa Rosa, New Mexico, and Farwell, Texas could be compared to prove price discrimination in commerce within the meaning of §2(a) despite the fact that (1) the only connection that Mead's Clovis Bakery had with interstate commerce was that defendant happened to send a daily bread truck to Farwell, Texas; (2) that the plaintiff did no business in Farwell, Texas or anywhere outside the State of New Mexico, and (3) that the competitive injury was wholly local in nature and resulted solely from Mead's local sales in Santa Rosa which did not occur in or involve interstate commerce. In so holding, Mr. Justice Douglas speaking for a unanimous Court declared at p. 119-120:

> ". . . The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources . . . Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business."
>
> • • •
>
> ". . . Congressman Utterback, manager of the bill in the House, included this type of case in the price cutting that he claimed was outlawed: 'Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade.'"

Here, as in *Moore*, the fact that the Mayers are essentially local businessmen should not deprive them, any more than *Moore*, of Robinson-Patman Act protection

against price discrimination by an enterprise engaged in interstate commerce.

Because of the importance of *Moore* on the commerce issue in this case, we have examined this Court's record in order to determine what amount of interstate business Mead actually did in Farwell during the period of the local price war which destroyed plaintiff's business. The record establishes that during the period of the price war, Mead had sales of $2,302 in Farwell which represented approximately 1.7% of its total sales of $135,129, all of the remainder of which were wholly intrastate in nature (Cert. No. 121, Oct. Term, 1954, Transcript of Record, p. 217). This minuscule amount of interstate sales should be compared with Material Service's sales to the four Indiana paving contractors who testified in this case which totaled $4.5 million during the 1958-1968 period at prices 20¢ to 30¢ less per ton than those charged petitioners.

Unable to rationally distinguish *Moore*, the majority relies instead on the unreasoned distinction that *Moore* was a primary line rather than a secondary line case. This purported difference between primary and secondary line cases, so far as the commerce prerequisites are concerned, is not explained in terms of the statutory language of the Robinson-Patman Act or the congressional history of the statute.

In *Moore*, for example, let us assume that the plaintiff had been a Santa Rosa merchant rather than a baking company. Assume further that Mead sold its bread to merchants in Farwell and Clovis at full price, but in Santa Rosa sold at one-half price to a chain store while extracting the full price from our merchant plaintiff who

competes with the chain. Would this Court have affirmed dismissal of the action on commerce grounds merely because the hypothetical plaintiff was a merchant rather than a baking company and the case classified as a secondary rather than a primary line action?

We believe it would not have so done because no rational basis exists for a distinction on the question of commerce. As Mr. Justice Clark observed in dissent (App. 20a):

> "The majority also adopts the argument of General Dynamics that *Moore* v. *Mead's Fine Bread Co., supra,* is inapposite because it involved primary competition between Moore and Mead. I find nothing in §2(a) that limits its coverage to primary competition cases. . . To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts."

We believe the Court below, in refusing to follow this Court's decision in *Moore,* failed to recognize that decision's controlling significance despite Mr. Justice Clark's dissenting opinion. As Mr. Justice Clark stated, the majority's decision "will severely restrict the holding" in *Moore,* and cannot be reconciled with that decision (App. 16a, 20a). The decision below is in square conflict and should be reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

September Term, 1972 — April Session, 1973

Nos. 72-1613, 72-1703 and 72-1704

Mayer Paving and Asphalt Company, an Illinois corporation, and Lee O. Mayer, sole surviving partner of Mayer Paving Company, a co-partnership,
Plaintiffs and Counter-Defendants, Appellants and Cross-Appellees,

vs.

General Dynamics Corporation, A Delaware corporation and Material Service Corporation, A Delaware corporation,
Defendants and Counter-Claimant, Appellees and Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 1803
J. Sam Perry, *Judge.*

Argued May 25, 1973 — Decided October 1, 1973

Before Clark, *Associate Justice,** and Pell and Sprecher, *Circuit Judges.*

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

PELL, *Circuit Judge.* Mayer Paving and Asphalt Company and Lee O. Mayer appeal from a judgment in favor of Material Service Corporation, a subsidiary of General Dynamics Corporation, on its counterclaim and from a judgment n.o.v. in favor of defendants on plaintiff's complaint. Plaintiffs alleged that they had been the victims of illegal price discrimination in the sale by General Dynamics of crushed limestone which plaintiffs used in their paving business. The price discrimination was charged to be a violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, §1, 49 Stat. 1526, 15 U.S.C. §13(a).[1] General Dynamics Corporation's subsidiary, Material Service, counterclaimed for foreclosure of a mortgage and for the balance due on a promissory note and open account, most of which arose out of the course of dealing between Mayer Paving and General Dynamics. On this appeal, Mayer Paving raises two principal issues: first, the propriety of the district court's grant of judgment n.o.v., and second, the jurisdiction of the district court to enter a judgment against plaintiffs on Material Service's counterclaim.

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[1] 15 U.S.C. §13 provides in pertinent parts:

"(a) It shall be unlawful for any person engaged in commerce, in the coures of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Lee O. Mayer and her husband, Sidney R. Mayer, Sr., operated Mayer Paving Company as a partnership until the latter's death in October 1964. Thereafter, the business was incorporated as Mayer Paving and Asphalt Company. The plaintiffs will hereinafter be referred to collectively as Mayer Paving. Mayer Paving engaged in the asphalt paving business at all material times and had its principal place of business in Skokie, Illinois. Material Service Corporation was originally organized to produce and distribute crushed limestone, sand, and other aggregates in the paving and construction business. On December 31, 1959, General Dynamics Corporation acquired the assets of Material Service Corporation through a statutory merger. Thereafter Material Service was operated as a division, Material Service Division, until it was reincorporated as a wholly owned subsidiary in March 1969.

Material Service operates five quarries in the Chicago area and sells to paving and construction contractors in Indiana and Illinois. Mayer Paving alleged and the jury from its verdict apparently concluded that during all relevant times[2] Material Service was guilty of charging Mayer Paving higher prices for stone than it charged Mayer Paving's competitors. The jury was unpersuaded by Material Service's evidence concerning the cost and other claimed justifications of the various price differences.

Following the entry of judgment on the jury's verdict, General Dynamics and Material Service moved for judgment n.o.v. on the ground that Mayer Paving had not established the jurisdictional prerequisite for a Robinson-Patman Act suit. The district court granted the motion in a memorandum opinion dated June 9, 1972. The court

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[2] The district court ruled that only the period within the four year statute of limitations, i.e., subsequent to August 29, 1965, would be considered, as Mayer Paving had failed to establish fraudulent concealment. Because of the conclusion we have reached on the scope of the Act, we do not find it necessary to consider this point.

based its decision on its opinion that the factual situation here involved fell within the ambit of *Borden Company* v. *Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964), rather than *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). The district court concluded that *Borden* held that the Robinson-Patman Act did not cover a customer's action for price discriminations when all of the properly challengeable sales were intrastate.

Section 2(a) of the Clayton Act, as amended, requires three different types of "in commerce" (i.e., interstate commerce) tests to be satisfied before jurisdiction can be established: first, the discriminator must be "in commerce"; second, the challenge discrimination must occur "in the course of such commerce"; and third, "either or any of the purchases involved in such discrimination are in commerce. . . ." "The first two elements of the statutory 'commerce' provision are of lesser import. . . . Of prime decisional significance . . . is the test that the challenged discriminatory transaction must itself occur 'in' commerce. Under that test, the applicability of Robinson-Patman is determined by this rule of thumb: at least one of the two transactions which, when compared, generate a discrimination must cross a state line." Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), §4.9, at 78-79. Such is the case in the present controversy as defendant does not challenge that it is itself "in commerce" and that the discrimination may have occurred in the course of commerce. The parties are deadlocked on whether or not the third "commerce" requirement has been met. Mayer Paving may not avail itself of the seemingly applicable language of §3 of the Robinson-Patman Act, 15 U.S.C. §13(a), since that section provides no private right of action. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958).

Mayer Paving contends in reliance upon *Moore* that, since Material Service sold to a number of firms in Indiana at prices lower than those given Mayer Paving, the third commerce requirement has been satisfied: ". . . once having established discrimination in commerce within

the meaning of §2(a), proof of competitive injury is sufficiently demonstrated when it is shown that Mayer Paving and other Illinois contractors are consistently charged substantially higher stone prices than their local competitors as well as Indiana contractors."

General Dynamics, on the other hand, contends that in a case of second-line discrimination, that is one in which the customers of the discriminator sue for damages to competitive position, such as is alleged by Mayer Paving, one of the discriminatory sales which is "in commerce" must be either to the plaintiff or to a competitor of the plaintiff. "That MS [Material Service] may have made interstate sales to Indiana contractors is irrelevant.[2a] Those Indiana contractors did not compete with Mayer, nor did the southern Cook County contractors who did small amounts of business in Indiana. . . . Therefore, this case only involves sales by MS of crushed limestone produced in Illinois to Mayer and its competitors for use in Illinois." We are thus presented with a pure question of statutory interpretation.[3]

[2a] This apparent concession by General Dynamics is obviously of an arguendo nature for it is footnoted in the brief as follows: "Actually, since the Indiana contractors picked up their stone at MS's Thornton [sic] Quarry, it is hard to see how even those sales can be 'in commerce.'" Noting that this factual assertion was not denied in Mayer's reply brief, we agree that the sales to Indiana contractors, as to whom Mayer did not claim any status of competition or even potential competition, were not sales "in commerce." The sales transactions completed at the quarries, all of which were in the state of Illinois, were clearly intrastate sales.

[3] Mayer Paving has not argued in this court that its activities in Indiana, which might be characterized as *de minimis*, brings it into competition with Indiana contractors. At trial, counsel for defendants established on cross-examination that Mayer Paving's Indiana contracts barely involved purchases from Material Service with most of the work being sublet.

Initially, we should note that the scope of the Robinson-Patman Act amendments to the Clayton Act is significantly different from the Sherman Act's in this very requirement that one sale be "in commerce." *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 36 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077; *A. Cherney Disposal Co.* v. *Chicago & Suburban Refuse Disposal Association*, No. 72-1303 (7th Cir., filed June 28, 1973) (slip op. p. 5). In contrast to the specific requirements of the Robinson-Patman Act, "it appears settled that only those activities are beyond the reach of the Sherman Act which are 'purely local' in the double sense that they (1) are not within the flow of interstate commerce and (2) have no significant effect on that flow." ABA, ANTITRUST DEVELOPMENTS 1955-1968, 39 (1968). Thus, we do not presently need to consider whether Congress has the power to reach such discriminations as are alleged by Mayer Paving. What we must determine is whether Congress intended to reach such discriminations.

"The Robinson-Patman Act as a whole was the product of such a complex series of interrelated legislative proposals that congressional intent is unusually difficult to decipher." Recent Cases, 86 HARV. L. REV. 765, 769 (1973). This is particularly true of the phrase requiring one of the sales to be "in commerce." *Compare* Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1166 n. 46 (1958) *with* Recent Cases, *supra*, 86 HARV. L. REV. at 769-771.

We agree with the district court's appraisal that the decision of this appeal is dependent upon whether the

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[2] (Continued)

Further, Mayer Paving does not rely in this court on the fact that one of its competitors, Rock Road Construction Co., Des Plaines, Illinois, did work in Wisconsin, Illinois, Iowa, and Indiana, since it was established that Mayer Paving was not a competitor of Rock Road on any of its out-of-state work.

situation involved activates the guidelines of *Moore* or of *Borden*. Unfortunately, neither is factually squarely in point and ultimately we must determine what the congressional intent was with regard to the precise factual situation before us, in what we regard as a case of first impression. Nevertheless, because of their general pronouncements on the subject, we first turn to a consideration of *Moore* and *Borden*.

Certainly, the touchstone for analysis in the present area is Justice Douglas's opinion for a unanimous Supreme Court in *Moore*. In that case, Moore, was engaged in the bakery business in Santa Rosa, New Mexico, with none of its activities being in interstate commerce. The defendant was a corporation in competition with Moore for the local business in New Mexico. In addition to its intrastate business, the defendant was engaged in interstate commerce in that it sold bread in Farwell, Texas, with a truck originating in New Mexico. The plaintiff and the defendant became engaged in a price war in Santa Rosa, New Mexico, during which the defendant cut its price in Santa Rosa while holding its prices up in all other areas in which it was doing business, including its interstate business in Farwell, Texas. The Court held that such activity contravened the Clayton Act, as amended, even though the direct injury was purely intrastate. Mayer Paving relies heavily on the observation in *Moore* relating to the use of a treasury drawn from interstate business to finance impermissible local competition, 348 U.S. at 119, *compare Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 209 (5th Cir. 1969), and *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963), with *Littlejohn* v. *Shell Oil Co.*, 456 F.2d 225, 229 (5th Cir. 1972), *petition for rehearing en banc granted*, 470 F.2d 997 (5th Cir. 1973).[3a] But that issue is not really involved

[3a] Subsequent to the time that the drafting of this opinion was completed and the opinion had been circulated, this court learned that the Fifth Circuit, *en banc*, had vacated the earlier panel opinion insofar as it indicated

in the present case since *Moore* was a case of primary-line injury, injury to a competitor of the discriminator, and the present case involved secondary-line injury, injury to one of the customers of the discriminator. That distinction is well-established. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542-544 (1960), see also ROWE, PRICE DISCRIMINATION, supra, and it has substantial impact on the deposition of the present case.

Borden Company v. *Federal Trade Commission, supra*, which the district court below found to be controlling in the present case, while factually distinguishable is analogous to the present case. In *Borden*, this court refused to enforce the Commission's order because the alleged discriminatory sales from Borden's Portsmouth plant were without interstate indicia. "It [was] undisputed that the sales of milk were negotiated in Ohio, the milk was produced, processed and delivered in Ohio for resale in Ohio." 339 F.2d at 955. There is no suggestion that the Portsmouth plant sold any of its products in interstate commerce. It is that fact which, as Mayer Paving notes, distinguishes *Borden* from the present case. It scarely needs stating that the Borden Company was extensively engaged in interstate commerce. That is also true, although to a lesser extent, of both General Dynamics and Mead's Fine Bread in the *Moore* case, the latter defendant being one of several corporations having interlocking ownership and management in the same family. The pattern for growth of monopoly found by the Court

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[3a] (Continued)
a lack of necessity for at least one discriminatory interstate sale. 42 U.S.L.W. 2114 (August 10, 1973). In the present opinion, we had found *Littlejohn* as originally written not dispositive. The superseding *en banc* opinion, of course, strengthens the result reached by the opinion in the present case before this court. Since we have reached the result we did irrespective of the original *Littlejohn* opinion, we have not deemed it necessary to revise the references in our opinion to the original opinion nor to refer further to the *en banc* opinion other than noting that it supports the result we have reached.

in the situation in *Moore*, a primary-line injury, does not exist in this secondary-line injury case. In the case of the secondary-line injury of the present type,[4] we are persuaded that interstate character of General Dynamics' overall business is not a controlling factor any more than it was in *Borden*.

However, General Dynamics did sell interstate from its Illinois operations and, as noted, the factual situation differs in this respect from *Borden*. Similarly, other cases cited by defendant are distinguishable either as involving allegations of purely interstate sales, *e.g.*, *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928, and *Food Basket, Inc.* v. *Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967), or relying on the "flow of commerce" doctrine in which the court found that the goods had come to rest, *e.g.*, *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, *supra*, and *Walker Oil Co.* v. *Hudson Oil Co. of Missouri*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970), a doctrine which was inferentially undercut in Mr. Justice Clark's opinion for this court in *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana)*, 466 F.2nd 1163, 1166 (7th Cir. 1972).

In turning then for our decision to the wording of the statute we are reminded of Mr. Justice Frankfurter's appraisal that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic*

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[4] As will be indicated later in the opinion, attention must be directed to the exact factual situation creating the issue for determination. Thus, it was stated that it is "too well known to require extensive exposition—that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon a secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores." *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543-4 (1960). The situation causing concern did show a pattern for the growth of monopoly where there was an impact directly upon competition and the injury was "commerce" related.

Canteen Company v. *Federal Trade Commission*, 346 U.S. 61, 65 (1953). We shall also attempt to follow his admonition in the same case "to confine ourselves as much as possible to what is in dispute here." For our present purposes, that which is in dispute is whether there is a violation of the Act where all of the purchases in which price discrimination existed made by both Mayer Paving and its competitors were intrastate and therefore not "in commerce."

For the resolution of the particular dispute we again examine the words of the statute: "where either or any of the purchases involved in such discrimination are in commerce . . . ." It is our view that the word "involved" when read against the underlying purpose of the antitrust laws, to protect competition, requires that only the purchases by Mayer Paving competitors and by Mayer Paving itself be considered in determining whether "either or any" discriminatory sale is "in commerce." We are fortified in this conclusion by the fact that §2(a) specifies that a price discrimination is actionable only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." Only those purchases which might injure competition are "involved" under the Robinson-Patman Act.

Mayer Paving attempts to argue applicability of *Moore* by variations of the factual situation here involved. We are not concerned with other factual situations but only the one here involved and whether it calls into play the sanctions of the Robinson-Patman Act. Essentially, we have in the particular situation an analogue to standing. The customer has standing only to raise and compare those sales which are injurious to his competition. *Cf. Federal Trade Commission* v. *Anheuser-Busch, Inc., supra*, 363 U.S. at 342-343. The competitor of the seller, on the other hand, has more freedom under *Moore* since the Court has declared that the competitor of the seller is involved

in any sale which may be used to finance an intrastate price war in violation of the provisions of the Robinson-Patman Act. The analytical distinction involving the "competing customer" is discussed in Rowe, PRICE DISCRIMINATION, *supra* at 80. Similarly, the requirement that some evidence of competition exist to justify the invocation of this section of the Act is also found in *National Lead Co.* v. *Federal Trade Commission,* 227 F.2d 825, 836 (7th Cir. 1955), *rev'd on other grounds,* 325 U.S. 419 (1957). "For to the extent customers on different sides of a boundary line do not compete with each other, no adverse competitive effects on the customer level can ensue from the supplier's price variations." Rowe, PRICE DISCRIMINATION, *supra* at 179.

We do not find plaintiffs' reliance on *Littlejohn* v. *Shell Oil Co., supra,* persuasive. That case involved what one commentator has called "indirect primary-line competition." Case Comment, 57 MINN. L. REV. 1035, 1040 n. 26 (1973). The court was concerned with the "underwriting" theory found in the general language in *Moore,* discussed above. Here, there is no allegation that the buyers who allegedly received lower, non-justified prices were related to General Dynamics in any way similar to the manner in which the gasoline stations were related to Shell Oil and American Oil in the *Littlejohn* case.

Once we so limit the referent of "purchases involved," the clear language of the statute requires us to affirm the judgment n.o.v. for defendant since on this appeal Mayer Paving has not contended that any of the sales to its competitors or itself were "in commerce."[5]

Mayer Paving also challenges the jurisdiction of the district court to enter judgment on the counterclaim.

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[5] Because of the result we have reached on this issue we find it unnecessary to consider Mayer Paving's arguments as to fraudulent concealment, statute of limitations, and recoupment. Similarly, we need not consider General Dynamics' cross-appeals as to the insufficiency of Mayer Paving's proof at trial.

Mayer Paving in its original complaint named only General Dynamics Corporation as a defendant. In its answer, General Dynamics included a counterclaim on behalf of Material Service Corporation. After it filed a reply to the counterclaim, Mayer Paving moved for summary judgment or dismissal of the counterclaim on the ground that Material Service Corporation was not a party to the action. Following some procedural haggling, the district court[6] in a memorandum opinion dated May 7th 1971, ordered Material Service Corporation joined as a party pursuant to Rule 19(a) (2) (i), Fed. R. Civ. P., and denied Mayer Paving's motion for summary judgment on the basis that the counterclaim arose out of the transaction or occurrence that was the subject matter of the complaint and was compulsory pursuant to Rule 13(a), Fed. R. Civ. P., thus relieving Material Service from the necessity of establishing independent jurisdiction grounds.

General Dynamics referred to this problem as "a quibble as to terminology—a misnomer—which the previous attorneys for the plaintiffs and the attorneys for defendant had not deemed of sufficient importance to correct by amendment of the complaint to add Material Service Corporation as a formal defendant." We do not view it as such, although some of the alleged discrimination went back to a time when Material Service, as a separate corporation, was the sole seller to Mayer Paving. Without any assertion of its relation to the complaint save for a vague reference as "Material Service Division of General Dynamics, now Material Service Corporation," various counterclaims were asserted by an entity never named in the complaint and never otherwise made a party to the cause. Defendant in its brief argues that any defect was waived by plaintiffs' failure to object or otherwise raise the issue in its reply to the counterclaim, analogizing it to the waiver of the defense of lack of jurisdiction over the person found in Rule 12(h) (1), Fed. R. Civ. P. But that analogy is inapposite. Lack of subject matter

[6] District Judge Bernard M. Decker, to whom the case was then assigned.

jurisdiction is not waivable and must be raised by the court on its own motion, Rule 12(h) (3), Fed. R. Civ. P.

We turn then to the ground upon which the district court relied, that Material Service Corporation should be joined as a party under Rule 19(a) (2) (i) since the disposition of the action "in its absence may as a practical matter impair its ability to protect [its] interest." The general policy of Rule 19, as with the Federal Rules of Civil Procedure in general, is "the impulse . . . toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 724 (1966) (footnote omitted).

Under the Rule, Material Service Corporation would seem to be an interested party. The disposition of the action may collaterally affect its rights since it is the successor to the alleged principal violator of the law, Material Service Division. Thus, Material Service Corporation is arguably suitable for joinder under Rule 19(a)(2)(i). The only question is does it meet the general requirement of Rule 19(a) that "joinder will not deprive the court of jurisdiction over the subject matter of the action." Thus, joinder may be inappropriate if its destroys diversity of citizenship. Jurisdiction in the present case is founded upon 28 U.S.C. §1337, which gives the district courts original jurisdiction to hear cases arising under Acts of Congress "regulating commerce or protecting trade and commerce against restraints and monopolies." Normally, this jurisdictional basis would be lacking since the present Material Service Corporation did not come into existence until after the date at which Mayer Paving stopped making the purchases alleged in the complaint. If we construe the assumption of the assets and liabilities[1]

[1] The record is not entirely clear on the matter of assumption of liabilities although the liabilities frequently are travelling companions of the assets, which here were assumed. Nevertheless, the matter was not disputed by Mayer Paving.

of the former Material Service Division of General Dynamics by Material Service Corporation as carrying over and giving Mayer Paving a right of action against the new corporation for the old division's alleged violation of the antitrust laws, then we have a suitable jurisdictional basis for the joinder.

Once we can determine that Material Service Corporation was properly joined as a party defendant, it is clear that the counterclaim was properly within the jurisdiction of the district court. A compulsory counterclaim under Rule 13(a), Fed. R. Civ. P., "may be interposed without meeting jurisdictional requirements because it is auxiliary to the original action. . ." *Chance* v. *Country Board of School Trustees of McHenry County, Ill.*, 332 F.2d 971, 973 (7th Cir. 1964). Since the counterclaim for the unpaid stone arises out of the transactions that are the subject matter of the complaint, the counterclaim is compulsory and there was no need for any independent jurisdictional basis. *G & M Tire Co.* v *Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 441 (N.D. Miss. 1964).

However, we need not rest our decision solely on the foregoing analysis supporting joinder of Material Service Corporation as a defendant. Disregarding form for substance, the court could have treated the motion as a motion under Rule 14(a), Fed. R. Civ. P., to implead Material Service Corporation as a third-party defendant. Had counsel for defendant in terms chosen this possibly preferable course the entire matter would have been considerably simplified. On the facts of this case, especially after our review of the pleadings and briefs, it would seem that the third-party complaint was what was really involved since General Dynamics was in effect saying that its new subsidiary, Material Service Corporation had assumed all of the liabilities of the old Material Service Division and was, therefore, liable over to it for any violations of the Robinson-Patman Act committed by Material Service Division.

The sixth sentence of Rule 14(a) then provides the basis for Material Service Corporation's claim against Mayer Paving: "The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." The courts have split on the question of whether separate subject matter jurisdiction must be shown to sustain the third-party defendant's claim against the plaintiff. See 6 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: *Civil* §1458, at 311 n. 69 and §1444, at 229-234, esp. nn. 90 & 91. Even the commentators are in disagreement. Wright and Miller favor ancillary jurisdiction in this type of claim, 6 Wright & Miller, *supra*, §1444, at 234, and Moore indicates that it is inappropriate, 3 MOORE, FEDERAL PRACTICE ¶14.27 [2] (2d. ed.). We are persuaded that the better theory is to allow the claim to be brought under the ancillary jurisdiction power, especially since here the claim would have been a compulsory counterclaim subject to ancillary jurisdiction if the successor corporation had been originally named as a defendant. We agree with and adopt the reasoning of Circuit Judge Morgan in *Revere Copper & Brass Inc.* v *Aetna Casualty and Surety Co.*, 426 F.2d 709 (5th Cir. 1970), where this same question was analyzed and answered in favor of ancillary jurisdiction.

Thus, we affirm the district court's jurisdiction of the counterclaim on the alternative grounds that Material Service Corporation was properly joined as a defendant or that it was properly made a third-party defendant.

For the reasons given hereinbefore, the judgment of the district court is affirmed.

AFFIRMED.

MR. JUSTICE CLARK (dissenting):

This is the first dissent that I have filed in my several sittings with this Circut, and it is, therefore, with regret that I find myself in disagreement here. However, the appellant, Mayer Paving and Asphalt Company, has been deprived of a $498,204.00 verdict and judgment by the granting of a motion *non obstante veredicto,* and, in my judgment, the sole ground for such precipitous action is entirely unsupportable. Indeed, if finally sustained, it will operate as a repealer of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a) (1970), and will severely restrict the holding in *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115 (1954).

1. I say the ground upon which the motion *non obstante veredicto* was granted is unsupportable because the learned trial judge misapplied the holding of this court in *Borden Company* v. *FTC,* 339 F. 2d 953 (7th Cir. 1964). As I read it, *Borden* is not apposite. In it the Federal Trade Commission indulged itself in a *non sequitur,* i.e., that since Borden was in interstate commerce, it necessarily followed that all of its products were also in interstate commerce. This Circuit, I submit, correctly held that Borden's being in interstate commerce was not enough; "it must also be shown that the sale complained of was one occurring in interstate commerce." 339 F.2d 953, 955. In *Borden,* there was a complete absence of interstate sales from any of its plants in Ohio and no connection whatever between its local sales in Ohio and its interstate sales. The reversal was based entirely on these facts. 339 F.2d 953, 955.

2. Here exactly the opposite is shown by the record. Mayer's claim and proof were based on the shipments of crushed limestone by General Dynamics[1] from Illinois at discriminatory prices during 1958-1968 to asphalt manufac-

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* United States Supreme Court, retired, sitting by designation.

[1] Throughout my dissent I have adopted the designation "General Dynamics" given by the majority to the appellees

turers and paving contractors in Illinois and Indiana. The sales were made from five quarries of General Dynamics—all located in Illinois—and one of which was only a few miles from the Indiana border.[2] It was the closest source of crushed limestone for operators located in Indiana, especially East Chicago, Hammond, Gary and other nearby cities. A sales office for this quarry was located in LaPorte, Indiana, and a distribution yard at Gary. The record also shows that four Indiana paving contractors purchased over $4.5 million of crushed limestone and other products from General Dynamics which were shipped from its quarries in Illinois during the decade involved in the suit. As the trial judge found, there were "substantial sales of like goods" made by General Dynamics from Illinois quarries to Indiana customers; and the 1968 total sales of General Dynamics were some $29 million which were divided among customers in the two states.

Mayer's purchases from General Dynamics during the decade involved ran $5.4 million alone. This large volume, it was claimed, resulted from a requirements contract[3] required

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[1] (Continued)
and cross-appellants. Originally the company was known as Material Service Corporation; General Dynamics Corporation obtained the assets of Material Service in 1959 and the latter was operated as a division of General Dynamics, known as Material Service Division. In 1969 the latter was re-incorporated as a wholly owned subsidiary.

[2] The five quarries were Riverside, Federal, Stearns, Romeo and Thornton. The latter was regarded as the largest commercial quarry in the world and is located a few miles from the Indiana border at the intersection of the Tri-State.

[3] The contract was dated April 15, 1957, and its original draft provided that Mayer would purchase all of its requirements from Material Service Corporation for the ensuing five years but the final draft was changed to 80 percent of Mayer's requirements. The consideration was a loan or line of credit for $300,000 made by Material Ser-

in a credit or loan agreement between General Dynamics and Mayer obligating the latter for a five-year period to purchase 80 percent of its total limestone, etc., requirements from General Dynamics. Although the contract provided for the payment of "current market prices" on all orders, the proof revealed that Mayer was charged from 10 cents to 47 cents more per ton than favored customers of General Dynamics. Among its favored customers were the four Indiana operators mentioned, one of whom (A. Metz Inc.) competed with Mayer. Metz paid from 20 cents to 23 cents per ton less than General Dynamics charged Mayer, while Walsh and Kelly's (at Griffith, Indiana) price from General Dynamics ran as much as 30 cents less than Mayer's. There were also several General Dynamics' favored customers in competition with Mayer located in Illinois. For example, the Skokie Valley Asphalt Company (Des Plaines, Illinois) regularly paid between 32 cents to 47 cents less per ton during the damage period for crushed stone supplied by General Dynamics than Mayer was charged. Both the Indiana and Illinois price discriminations were uncontradicted at the trial and were clearly deleterious to genuine business competition.

It appears to me that a plain reading of §2 (a) prohibits such discrimination. It provides that if *"either* or *any* of the purchases involved in such discrimination *are in commerce"* then all are prohibited. The majority interprets the all-inclusive phrase "either or any" to apply to sales to Mayer only insofar as the presence of commerce is concerned. *Mead's Fine Bread* holds the opposite. Here the allegation and proof, uncontradicted, are that some local sales (from the same Illinois quarries) in Illinois as well as interstate ones to Indiana customers were at much lower prices than like sales to Mayer and other Illinois

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[3] (Continued)
vice Corporation. The validity of such an arrangement is suspect. See my opinion in *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co., Inc.*, Civil No. 48234, U.S. Dist. Ct., N. Dist. Cal. (Aug. 16, 1972).

customers. I always thought that this was a practice that §2(a) was specifically intended to prohibit. Here, while the quarry involved was only a few miles from Indiana, still Illinois customers were charged more for like material than were Indiana ones, without respect to delivery costs, etc. General Dynamics answers that Mayer was not a competitor in Indiana. Although this is not strictly true since it did compete somewhat unsuccessfully with A. Metz Inc., still Mayer was prevented from effectively competing across the border in Indiana because of the higher charges exacted from it. After preventing it from competing, General Dynamics now says that Mayer is deprived of the protections of § 2(a) because he did not compete. Such an interpretation transposes §2(a) into a tool of discrimination rather than a protection. The result is that interstate competition is lessened and Mayer is destroyed.

3. Strangely enough, the majority relies on the old and honored doctrine of standing to deprive Mayer of its jury verdict and judgment. The majority says: "The customer has standing only to raise and compare those sales which are injurious to his competition." Mayer does not compete in Indiana, it finds. Under the circumstances here this conclusion which the majority says is critical to its decision is a *non sequitur*. This record shows that General Dynamics sold all of the four Indiana operators involved in the discriminatory activity at such a lower rate per ton than it sold Mayer that the latter could not compete with them in Indiana. The record also shows that Mayer tried to compete in Indiana with A. Metz but failed. Indeed on one job there Mayer was obliged to sublet and buy the necessary material from a supplier other than General Dynamics. Finally, the record clearly shows that General Dynamics' action prevented Mayer and other Illinois asphalt manufacturers and paving contractors from competing in Indiana by its discriminatory pricing to favored customers. To hold that Mayer had no standing to sue in such a factual situation is to repudiate the mandate of Congress in § 2(a) and creates a barrier that in the final analysis will operate as a repealer of

this important section of the Act insofar as discrimination among customers of the same seller is concerned. The intent of the Congress in this regard is clearly stated by Congressman Utterback, manager of the bill in the House:

> "Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor *either to the disadvantage of the other*; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. . ." 80 Cong. Rec. 9417. (Emphasis supplied).

4. The majority also adopts the argument of General Dynamics that *Moore* v. *Mead's Fine Bread Co., supra,* is inapposite because it involved primary competition between Moore and Mead. I find nothing in § 2(a) that limits its coverage to primary competition cases. On the contrary, the Act's purpose was to prevent all discriminatory pricing "where the effect of such discrimination may be substantially to lessen competition . . ." That interstate competition was substantially lessened in the particular geographical situation involved here is without peradventure; that the discriminatory pricing, in the words of § 2(a) "injured, destroyed or prevented" Mayer from competing with "customers" of General Dynamics located in Indiana was found to be true by the jury and was embodied in the judgment entered by the court and now set aside. Section 2(a) says nothing about "primary" or "secondary" lines of competition. Its intent, as stated by its manager, Congressman Utterback, was to condemn all discriminatory pricing "injuring" interstate commerce. To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts. Rather than excepting from § 2(a) the customers of the seller—as the majority does unless they are competing with one another—for the purposes of determining the presence of interstate commerce—§ 2(a) *specifically* includes them and in the peculiar factual situation here requires, insofar as commerce is concerned, no proof of existing competition among the

customers of the same seller. When it comes to the assessment of damages, competition might be crucial. While the factual situation was different in *Mead's Fine Bread*, where the interstate operation afforded a treasury for destroying local competition, the thrust of *Mead's Fine Bread* also covers this case. Indeed, in *Mead* it was admitted that the Act covered situations where "interstate commerce is in some other way used to destroy competition or is injured or impaired by a result of unlawful acts." 348 U.S. 115, 119. Here interstate commerce was used and unlawful acts were perpetrated in a continuous pattern for over ten years in sales made in interstate commerce that not only lessened competition but injured, destroyed or prevented Mayer from competing.[4]

5. General Dynamics makes no further attack on the judgment other than the sufficiency of the proof of damages and its asserted good faith effort to meet competition. There is no evidence in the record supporting the latter claim that would grant General Dynamics forgiveness under the Act. The proof on damages appears, as the jury found, quite sufficient under the decided cases and should not be disurbed.

6. This case was submitted to a jury after three weeks of testimony. No point is made of any error in the instructions or the theory upon which the case was submitted, other than the jurisdictional point as to the existence of interstate commerce about which I have spoken. I find that it has no merit.

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[4] The majority also emphasizes that the "pattern for the growth of monopoly" found to be present in *Mead's Fine Bread* is non-existent here. While this is true, we must remember that § 2(a) was also specifically aimed at discriminations which may "substantially lessen competition . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

The Seventh Amendment provides that "no fact tried by a jury, shall otherwise be re-examined in any Court of the United States," U.S. CONST. amend. VII. As I see it the verdict of this jury should not have been "re-examined" and overturned nor the judgment set aside. It is late enough now to correct this mistake. The original judgment should be reinstated.[5]

[5] With reference to the counterclaim of General Dynamics, I agree with the majority that it should be affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

October 1, 1973

Before

Hon. TOM C. CLARK, *Associate Justice of Supreme Court**
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

MEMORANDUM AND ORDER
(Filed June 9, 1972)

This is an antitrust action brought under the Robinson-Patman Act. The plaintiffs, Mayer Paving and Asphalt Company, an Illinois corporation, and Lee O. Mayer, sole surviving partner of Mayer Paving Company, hereinafter referred to collectively as "Mayer", complain that the defendants General Dynamics Corporation and Material Service Corporation have discriminated against Mayer in the price which was charged for crushed limestone.

The case was tried before this court and a jury. At the conclusion of all the evidence the case went to the jury and it returned a verdict in the amount of $166,068.00.

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* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

Pursuant to the statute this verdict was trebled by the court and a judgment in the amount of $498,204.00 was entered in favor of the plaintiffs, together with costs of suit, including reasonable attorney's fees.

The case is now before this court on the defendants' Motion for Judgment N.O.V. The first ground advanced by the defendants, and the one which this court finds decisive, is that none of the sales being compared to show discrimination occurred in interstate commerce.

Mayer at all times relevant hereto was in the asphalt manufacturing and paving business, with its principal place of business in Skokie, Illinois. Mayer's business was conducted almost exclusively in northern Cook County, Illinois. The plaintiff's evidence shows only one insignificant driveway job in Indiana during the relevant period. Furthermore plaintiff's evidence shows that its competitors were engaged exclusively in intrastate commerce insofar as the asphalt business is concerned. The defendants on the other hand are large interstate corporations which do substantial business in Indiana.

The plaintiff's theory of the case is based on the Supreme Court decision in the case of *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). In that case, Moore, was engaged in the bakery business in Santa Rosa, New Mexico with none of its activities being in interstate commerce. The defendant was a corporation in competition with Moore for the local business in New Mexico. In addition to its intrastate business, the defendant was engaged in interstate commerce in that it sold bread in Farwell, Texas with a truck originating in New Mexico. The plaintiff and the defendant became engaged in a price war in Santa Rosa, New Mexico during which the defendant cut its price in Santa Rosa while holding its prices up in all other areas in which it was doing business including its interstate business in Farwell, Texas. In the face of the contention by the defendant that any injury shown as a result of the price cutting was to a local competitor and in no way related to interstate com-

merce, the Supreme Court found that by holding the line on interstate sales while engaging in a price war with local competitors, Mead had in effect underwritten the destructive price cutting with the profits from interstate profits to underwrite the destruction of a local business was barred by the Robinson-Patman Act.

Since *Moore* the various circuits have considered its applicability to various fact situations and have come up with varying results. It is however the obligation of this court to follow the holdings by the Seventh Circuit. In the case of *Borden Company* v. *Federal Trade Commission,* 339 F2d 953 (1964), the Court of Appeals for the Seventh Circuit considered a case which on its facts was very similar to the one at the bar. Borden was a large interstate concern with business in twenty-nine states. In the course of this business Borden sold to local merchants in Portsmouth, Ohio at prices which were found to be discriminatory in favor of certain local merchants. It was further found that the milk involved was processed and produced in Ohio. The F.T.C. found that: "Since it is impossible to divorce The Borden Company and its products, if The Borden Company is in commerce, so must be all its products." Based on this the Commission found that the local discrimination satisfied the commerce requirement of the Act.

The Seventh Circuit on appeal reversed the Commission's holding. It found itself in accord with the dissent of Commissioner Elman. The court held that three variants of the commerce requirement must be satisfied as Elman said:

> "First, respondent must be 'engaged in commerce'; second, the unlawful discrimination must occur 'in the course of such commerce'; third, 'either or any of the purchases involved in such discriminations' must be 'in commerce.'"

The court went on to hold that given these requirements the burden of establishing jurisdiction was not discharged

by showing that the respondent was an interstate concern or that it makes interstate sales. The court held that it was necessary to show that one of the challenged sales was in interstate commerce, and that the showing of discriminatory prices between local competitors did not fulfill this burden.

The *Borden* case is one of a series of cases which distinguish "primary line injury", that is injury to a competitor of the seller, from "secondary line injury", that is injury to competition between customers of the seller. Using this analysis the *Moore* case is easily distinguishable from the case at the bar in that it is clearly a "primary line" case whereas the present case is clearly a "secondary line" case.

If this case were one of first impression coming upon the heels of the *Moore* case, this court would not have made the distinction outlined above in determining whether jurisdiction existed under the "in commerce" requirements of the act. This court would have found that a showing of substantial interstate sales of like goods is sufficient to satisfy the jurisdictional requirements.

This however is not a case of first impression and this court feels compelled to follow the holding in the *Borden* case. If the *Borden* case is not the law of this Circuit it is up to the Court of Appeals to say so.

Although it is the judgment of this court that *Borden* is applicable, the court let this case go to the jury on the *Moore* v. *Mead* theory with the idea of obviating a need for a second trial, if it is the judgment of the Court of Appeals that *Moore* controls.

For the reasons cited herein the defendants' Motion for Judgment N.O.V. is granted. Since this disposes of the motion, it is not necessary to reach the other grounds raised by defendants in their motion.

It is hereby Ordered that the verdict of the jury in the amount of $166,068.00 and the judgment of the court for $498,204.00 entered thereon be and they hereby are vacated and set aside. Judgment is hereby entered in favor of defendants and against plaintiffs, together with costs.

ENTER:
/s/ J. S. Perry
Judge

Dated: June 9, 1972
Chicago, Illinois

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed September 28, 1971)

This cause coming on to be heard upon the Motion of defendant and counter-plaintiff, Material Service Corporation ("Material Service"), for summary judgment as to the issues of liability in its three count Counterclaim, the Court having considered such motion, the affidavit submitted in support of such Motion, and the Memoranda of counsel for the parties and being fully advised in the premises, now finds:

FINDINGS OF FACT

1. Defendant and Counter-plaintiff Material Service is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in Chicago, Illinois. It is a wholly-owned subsidiary of General Dynamics Corporation ("General Dynamics").

2. Plaintiff and Counter-defendant Mayer Paving and Asphalt Company ("Mayer Paving") is a corporation organized and existing under the laws of the State of Illinois, having its principal place of business in Skokie, Illinois.

3. Plaintiff and Counter-defendant Lee O. Mayer is the sole surviving partner in the former partnership of Sydney Mayer and Lee O. Mayer doing business as Mayer Paving Company.

4. Mayer Paving is in default in its payment for goods sold and delivered to it by Material Service between March 1, 1967 and April 30, 1969.

5. On or about April 22, 1957, for value received, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, executed and delivered to Material Service Corporation, an Illinois corporation, a promissory note whereby they promised to pay Material Service Corporation, an Illinois corporation, on or before January 15, 1961 the sum of $300,000 with interest thereon at the rate of five per cent (5%) per annum. A copy of such note is attached to the Counterclaim as Exhibit "B". Lee O. Mayer is in default in her payments on such note. As security for the payment of such note, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, at the same time executed and delivered to Material Service Corporation, an Illinois corporation, a real estate mortgage and a chattel mortgage in favor of Material Service Corporation, an Illinois corporation. The real estate mortgage was recorded with the office of the Recorder of Deeds of Cook County, Illinois, on April 22, 1957 as Document No. 1688314. A copy of the real estate mortgage is attached to the Counterclaim as Exhibit "C" and a copy of the chattel mortgage is attached to the Counterclaim as Exhibit "F".

6. On or about February 1, 1960, for value received, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, executed and delivered to the Material Service Division of General Dynamics, a promissory note whereby they promised to pay Material Service Corporation of General Dynamics on or before January 15, 1961, the sum of $300,000 with interest thereon at the rate of five per cent (5%) per annum. A copy of such Note is attached to the Counterclaim as Exhibit "D". Lee O. Mayer is in default in her payments on such note. As security for the payment of such note, Lee O. Mayer individually and as

co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, at the same time executed and delivered to the Material Service Division of General Dynamics a real estate mortgage and a chattel mortgage in favor of Material Servise Division of General Dynamics. The real estate mortgage was recorded with the office of the Recorder of Deeds of Cook County, Illinois, on February 23, 1960 as Document No. 17787996. A copy of the real estate mortgage is attached to the Counterclaim as Exhibit "E" and a copy of the chattel mortgage is attached to the Counterclaim as Exhibit "G".

7. On or about February 1, 1960, for value received, Mayer Paving unconditionally guaranteed the notes dated April 22, 1957 and February 1, 1960 and more fully described in Findings Nos. 5 and 6. Mayer Paving is in default on its obligations assumed in such guarantee. A copy of such guarantee is attached to the Counterclaim as Exhibit "H".

8. On or about April 4, 1968, for value received, Mayer Paving and Lee O. Mayer executed and delivered to the Material Service Division of General Dynamics a promissory note whereby they promised to pay the Material Service Division of General Dynamics on or before March 31, 1969 the sum of $100,000 with interest thereon at the rate of seven per cent (7%) per annum. A copy of such note is attached to the Counterclaim as Exhibit "A". Mayer Paving and Lee O. Mayer are in default in their payments on such note.

9. Material Service Corporation, an Illinois corporation, was merged into General Dynamics, a Delaware corporation, effective December 31, 1959, and ownership of the note and mortgages dated April 22, 1957 and more fully described in Finding No. 6 was transferred from Material Service Corporation to General Dynamics as a result of said merger.

10. From January 1, 1960 through March 31, 1969 the business and properties of Material Service Corporation,

an Illinois corporation, which was merged into General Dynamics, were operated as the Material Service Division of General Dynamics. Material Service Division of General Dynamics owned the notes and mortgages dated April 22, 1957, February 1, 1960 and the additional note dated April 4, 1968, all as more fully described in Findings Nos. 5, 6 and 8 and the guarantee dated February 1, 1960 and more fully described in Finding No. 7.

11. On March 31, 1969, ownership of the notes and mortgages referred to in Findings Nos. 5, 6 and 8 and the guarantee referred to in Finding No. 7 was transferred by the Material Service Division of General Dynamics to Material Service Corporation, a Delaware corporation, which is a defendant and counter-plaintiff in this cause.

12. Since at least April 22, 1957, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, was the owner in fee simple of the following described real estate situated in the County of Cook, State of Illinois:

> The South 3 acres of that part of the North ½ of the West ½ of the South West ¼ of the South East ¼ of Section 26, Township 41 North, Range 13 East of the Third Principal Meridian which lies West of East 240 feet thereof (as measured along the North line of the South West ¼ of the South East ¼ aforesaid) in Cook County, Illinois, and known as 7300 St. Louis Avenue, Skokie, Illinois.

13. Since at least April 22, 1957, Lee O. Mayer was the owner of an undivided one-third interest in fee simple in the following described real estate situated in the County of Cook, State of Illinois:

> The North West ¼ of the South West ¼ of the South East ¼ of Section 26; Township 41 North, Range 13 East of the Third Principal Meridian (except the East 240 feet of the said North West ¼ as measured along the North line thereof) and except the

South 3 acres of that part which lies West of the East 240 feet of said North West ¼ in Cook County, Illinois.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. Material Service has established that Mayer Paving is in default in its payments for goods sold and delivered to it by Material Service during the period from March 1, 1967 to April 30, 1969, and that Mayer Paving is liable for the unpaid balance owing for such goods.

3. Material Service has established that Mayer Paving and Lee O. Mayer are in default in their payments on the note dated April 4, 1968 and more fully described in Finding No. 8 and that Mayer Paving and Lee O. Mayer and jointly and severally liable for the unpaid balance owing on such note.

4. Material Service has established that Lee O. Mayer is in default in her payments on the note dated April 22, 1957 and more fully described in Finding No. 5, and that Lee O. Mayer is liable for the unpaid balance owing on such note.

5. Material Service has established that Lee O. Mayer is in default in her payments on the note dated February 1, 1960 and more fully described in Finding No. 6 and that Lee O. Mayer is liable for the unpaid balance owing in such note.

6. Material Service has established that Mayer Paving unconditionally guaranteed payment of the notes dated April 22, 1957 and February 1, 1960 and more fully described in Findings Nos. 5 and 6, and that Mayer Paving is in default on its obligations assumed in such guarantee and that Mayer Paving is jointly and severally liable with Lee O. Mayer for the unpaid balances owed on such notes.

7. An alleged violation by General Dynamics and/or Material Service of the Robinson-Patman Act cannot be asserted as an affirmative defense or by way of recoupment in an action for collection of moneys owed for goods sold and delivered or for moneys owed on notes. *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 752-54, 757 (1947).

8. Lee O. Mayer and Mayer Paving failed to introduce any evidence that the note referred to in Finding No. 6 and the guarantee referred to in Finding No. 7 were only conditionally delivered to the Material Service Division of General Dynamics. In any event, evidence of oral conditions to such note and guarantee would be inadmissible for reasons of the parol evidence rule. *Chandler* v. *Chandler*, 326 Ill. App. 670, 63 N.E. 2d 272 (1945). In addition, a refusal to loan additional money is no defense to an action seeking to recover moneys previously loaned.

9. Unless the amount owed by Mayer Paving and Lee O. Mayer are stipulated to by the parties, such amounts will be determined at the trial of the cause in chief. Material Service may request an earlier prove-up of its damages, if it feels such action is necessary to protect its rights as determined by these Findings of Fact and Conclusions of Law.

ENTER:

/s/ J. S. Perry
District Judge

Dated: September 28, 1971

MEMORANDUM OPINION
(Filed May 7 1971)

This is a class action brought by a paving contractor against a supplier of crushed limestone used in paving highways and other large flat surfaces for an alleged violation of the Robinson-Patman Act (Count I) and the Sherman Act (Count II). Defendant is General Dynamics Corporation, whose Material Service Division supplied the crushed stone during the period at issue in the complaint. Plaintiff Mayer Paving and Asphalt Company has named itself to represent a class of paving contractors allegedly discriminated against in the price of stone sold by defendant.

The dispute in this case grows out of the chameleon-like quality of Material Service. Prior to December 31, 1959, Material Service Corporation was a separate entity, unrelated to General Dynamics. In 1959, the two corporations merged and Material Service become a division of General Dynamics. Then in April of 1969 Material Service was made a separate corporate entity again, becoming a wholly-owned subsidiary of General Dynamics.

Only General Dynamics was named as defendant in this action. However, the acts complained of began in the year 1958, when Material Service was still a separate corporate entity. Indeed, Mayer Paving recognizes in its complaint (¶ 4) that its cause of action is against Material Service Corporation up until the time of the merger, and from that time forward it is against General Dynamics. It is also clear that the assets of the old Material Service Division of General Dynamics now belong to the post-1969 Material Service Corporation.

Under the circumstances, Material Service Corporation is a party to be joined if feasible. F.R.Civ.P. §19(a) (2) (i). It claims an interest in the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair its ability to protect that interest. See *Evergreen Park Nursing and*

Convalescent Home, Inc. v. *American Equitable Assurance Co.*, 417 F.2d 1113, 1115 (7th Cir. 1969). Material Service is subject to service of process in this jurisdiction, and joinder will not deprive the court of jurisdiction over the subject matter, 28 U.S.C. §1331, hence it should be made a party defendant. F.R.Civ. P. §19(a); *cf First Financial Marketing Services Group* v. *Field Promotions, Inc.*, 286 F.Supp. 295 (S.D.N.Y. 1968).

Material Service has filed a three-count counterclaim. It seeks to recover the price of goods sold and delivered to Mayer Paving (Count I), the balance due on a promissory note (Count II), and the proceeds from a mortgage foreclosure on Mayer Paving's property (Count III). The transactions giving rise to Count I, the sale and delivery of goods by Material Service to Mayer Paving, are the same ones in which, according to the allegations of the complaint, Material Service charged discriminatory prices. The notes involved in Counts II and III, even though executed as early as 1957 (Count III), were used, to some extent, to purchase goods from Material Service, which (again) were allegedly priced discriminatorily. Hence, it is clear that the counterclaim arises out of the transaction or occurrence that is the subject matter of the complaint, and being compulsory, independent jurisdictional grounds are not necessary. F.R.Civ.P. §13(a); *G & M Tire Co.* v. *Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 441 (N.D.Miss 1964).

On October 8, 1970, Material Service moved for partial summary judgment on its counterclaim. None of the plaintiffs responded to the motion, either with briefs or affidavits. Moreover, Mayer Paving's original counsel withdrew from the case and was replaced by new counsel, who has not responded to the motion. Thus while Material Service may be technically entitled to summary judgment at this point, F.R.Civ.P. §12(e), I feel compelled not to grant it at this time. Plaintiff's counsel is sufficiently new to the case and at least should be given the opportunity to respond to the motion by the prompt filing of a brief, with counter-affidavits, if desired.

Accordingly, it is ordered that Material Service be made a party defendant in this action. The order of January 21, 1971, granting plaintiffs' motion for summary judgment dismissing Material Service's counterclaims is hereby vacated, and the counterclaims are reinstated in this action. Finally, plaintiff is given ten days to respond to the motion of Material Service for partial summary judgment, with five days for defendant's response.

ENTER:

/s/ Bernard M. Decker
United States District Judge

Dated: May 7, 1971.

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No. 73-671

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In the Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and **LEE O. MAYER**, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and **MATERIAL SERVICE CORPORATION**, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court's Memorandum and Order of June 9, 1972, setting aside the verdict and the judgment thereon is not reported but is set forth in Petitioner's Appendix at page 23a. The September 28, 1971, Findings of Fact and Conclusions of Law of the District Court granting

summary judgment on the issues of liability presented by the counterclaim are not reported but appear in Petitioners' Appendix at page 27a. The District Court's May 7, 1971, Memorandum Opinion ordering that Material Service Corporation be made a party defendant in the action and reinstating its counterclaim is not reported but appears in Petitioners' Appendix at page 33a. The Opinion of the Court of Appeals for the Seventh Circuit is not yet reported but appears in Petitioners' Appendix at page 1a. Mr. Justice Clark's dissenting opinion is found on page 16a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

For the reasons stated in our "Statement Of The Case", the question presented must be rephrased as follows:

Whether, in an action brought against a vendor pursuant to Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the "in commerce" requirements of the Act are met where none of the sales by the defendant to plaintiff or by defendant to plaintiff's competitors are in interstate commerce and the plaintiff is not engaged in interstate commerce and is not a competitor of companies which are engaged in interstate commerce.

STATUTES INVOLVED

The statutes involved are Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), and Section 4 of the Clayton Act, 15 U.S.C. §15 which are set forth in the Petition at page 3.

STATEMENT OF THE CASE.

The Petitioners' description of the entities involved in this matter and the general nature of their business relationship is adequate for the purposes of this opposition brief.

However, Petitioners' (hereafter "Mayer") assertion that the majority opinion and the dissent of Mr. Justice Clark "are in substantial agreement with respect to the facts shown of record" (p. 7) is without any foundation in the record. On the contrary, with respect to the facts about competition crucial to the matter at hand, Mr. Justice Clark has misapprehended the record and taken positions contrary to that of the Trial Judge, the majority of the Seventh Circuit panel and, indeed, of Mayer itself during all of the proceedings below.

Apparently relying on misapprehensions of fact expressed in the dissenting opinion, Mayer's Statement Of The Case obscures the uncontradicted evidence as to the vital facts as to where Mayer did business, where its competitors did business and where Mayer attempted to do business.

One key misapprehension of fact in the dissenting opinion, relied on by Mayer, is that an Indiana contractor, A. Metz, Inc., "competed with Mayer" (p. 18a); that Mayer "did compete somewhat unsuccessfully with A. Metz, Inc." (p. 19a). In its Petition (p. 8) Mayer, for the first time in this proceeding, seems to claim that Indiana company as a competitor. It did not do so at any time in either court below and in appearing to do so now seems to be relying on the dissent's misapprehension of fact rather than on the evidence at trial where Mr. Metz testified that he did not do any business in Illinois during the period deemed

relevant by Mayer and that Mayer was not a competitor. The relevant testimony of Mr. Metz went as follows:

> "Q. During the period 1958 to '68 did you do any paving work in the State of Illinois?
> "A. No.
> "Q. Do you consider Mayer Paving, or did you during the period 1958 to '68, consider Mayer Paving to be a competitor of yours in the asphalt paving business?
> "A. Well, he was doing work in the area, not that we noticed too much. Apparently he didn't take too much work there.
> "Q. Was that tennis work there sir?
> "A. Well, the point I am bringing out, he did so little work that we didn't even recognize him as a competitor." (Tr. pp. 1225, 1226)

There is no evidence in the record to the contrary.

After the trial, in granting the motion of Respondents for Judgment N.O.V., the Trial Judge held "Mayer's business was conducted almost exclusively in Northern Cook County, Illinois. [Mayer's] evidence shows that its competitors were engaged exclusively in intrastate commerce insofar as the asphalt business is concerned" (p. 24a). Mayer never quarreled with these findings in the Court of Appeals. In its brief to the Court of Appeals for the Seventh Circuit, Mayer, in connection with its argument that "competitive injury, even when purely local is actionable" under Section 2(a) of the Act (Opening Brief p. 33), candidly admitted that it "remained essentially a local businessman and not a real competitor for paving business in Indiana" (Opening Brief p. 30); the same admission that Mayer is essentially a local businessman is repeated in the Petition at page 14. The majority opinion of the Court of Appeals accurately stated, therefore, that "on this appeal Mayer Paving has not contended that any

of the sales to its competitors or itself were 'in commerce'" (p. 11a), and that "Mayer Paving has not argued in this court that its activities in Indiana, which might be characterized as *de minimis*, brings it into competition with Indiana contractors" (n., p. 5a).

A second fundamental misapprehension of the trial issues and record and the issues on appeal is revealed by the following statements in the dissenting opinion: "Mayer was prevented from effectively competing across the border in Indiana * * * it tried to compete in Indiana with A. Metz but failed * * * General Dynamics' action prevented Mayer and other Illinois asphalt manufacturers and paving contractors from competing in Indiana * * *" (p. 19a). In apparent reliance on these statements Mayer now belatedly asserts (p. 9) that it was not an "effective" competitor in the "northwest Indiana area", *i.e.* it was some kind of a competitor in northwest Indiana. The fact of the matter, as pointed out in the majority opinion, is that "Mayer did not claim any status of competition or even potential competition" with respect to Indiana contractors (n., p. 5a).

Mayer also inexplicably adopts the view in the dissenting opinion that General Dynamics did not seek to contradict the evidence Mayer relied on at trial to show price discrimination (pp. 8, 18a). On the contrary, consistent with its objections at trial and its alternative motion for a new trial in the trial court, one whole section of Material Service's Brief in the Court of Appeals consisted of argument captioned as follows:

> "THE RECORD IS BARREN OF EVIDENCE THAT MATERIAL SERVICE WAS GUILTY OF DISCRIMINATION IN PRICE AS TO MAYER. WHAT THE RECORD SHOWS IS THAT MAYER WAS A FAVORED PURCHASER RATHER THAN A DISFAVORED PURCHASER."

That General Dynamics did contradict the evidence relied on by Mayer in the trial court to show price discrimination was acknowledged by the majority below when it said: "Because of the result we have reached on this [the 'in commerce'] issue we find it unnecessary to * * * consider General Dynamics' cross-appeals as to the insufficiency of Mayer Paving's proof at trial" (n., p. 11a).

Mayer also distorts the posture of this case when it asserts that the majority of the court below "did not dispute the fact that the Mayers had suffered severe discrimination in their purchases in comparison with their Illinois competitors" (p. 9). As we have just pointed out, the majority did not reach the issue of the sufficiency of Mayer's evidence on the issue of price discrimination.

ARGUMENT

I.

The Court of Appeals for the Seventh Circuit Correctly Interpreted the Commerce Provisions of Section 2(a) of the Clayton Act, as Amended, Consistent with Prior Decisions of this Court.

The argument advanced by Mayer, if adopted by this Court, would completely divorce the concept of competition from the Robinson-Patman Act. On the strength of a 23-word excerpt of a lengthy and difficult legislative history,* Mayer seeks to extend the jurisdiction of the Robinson-Patman Act to accomplish irrational results. Under Mayer's argument, if a New York manufacturer sold to an Illinois retailer at a higher price than he sold to a California retailer, the Illinois retailer would, for purposes of the Robinson-Patman Act, be deemed to have been prejudiced and adversely affected in his "competition" although, *in actual fact,* no competition existed between the California and Illinois retailer. Under Mayer's theory the crucial facts of competition become "factoids".

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* Mayer's interpretation of the legislative history of the Robinson-Patman Act is both imaginative and unique. Mayer's Petition attempts to imply that the words "any person, whether in commerce or not" were carefully and surgically deleted from the House version of the bill. A reading of the Conference Committee Report plainly discloses what the joint Conference deleted and the reasons therefor. Frederick Rowe, based upon his reading of the deleted clause, in its entirety, asserts that the Conference "struck a clause in the House bill which would have adopted the 'effect on commerce' criterion." F. Rowe, *Price Discrimination,* § 4.9 at p. 78 (1962).

This is completely contrary to every reasoned analysis of the Robinson-Patman Act. The nexus between the Robinson-Patman Act and any alleged discrimination is *competition* in commerce. The legislative history,* the courts, and the commentators all agree on this point. As the Court of Appeals properly observed, a price discrimination is actionable only to the extent that it affects competition in interstate commerce. This basic principle has been consistently enunciated by the courts following this Court's decision in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). *See Lerhman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972); *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); *Food Basket Inc.* v. *Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). The Court of Appeals properly applied that established principle to this case.**

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* Representative Utterback described this concept as follows:

"Underlying the meaning of the word [price discrimination] is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. * * * But where no such relationship exists . . . the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

** The only arguable exception to this statement is the recent decision of *Copp Paving Co.* v. *Gulf Oil Co.*, No. 72-2152 (9th Cir. Oct. 3, 1973). In the *Copp* case, the ninth Circuit held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and

(footnote continued on next page)

When the courts have interpreted and applied a given act of Congress repeatedly and Congress has not acted to in any way rebuke or invalidate that interpretation, this Court has declared that such interpretation has been accorded legislative approval. *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Ry.*, 385 U.S. 182, 184 (1966); *Blau* v. *Lehman*, 368 U.S. 403, 412-13 (1962); *United States* v. *Elgin, Joliet & E. Ry.*, 298 U.S. 492, 500 (1936). That is the situation which now confronts this Court. If Congress intended to amplify or in any way broaden the scope of the Robinson-Patman Act it could have, and presumably would have, done so. Its refusal to act indicates a Congressional approval of the judicial interpretation accorded the Act.

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placed them 'in' that commerce as a matter of law." The court further held that, for purposes of the Robinson-Patman Act, in such a situation, there is no requirement that one of the challenged sales be of an interstate character. To the extent that Mayer will argue in reply that the *Copp* case presents a conflict, some brief discussion is required. First it should be observed, that the issues presented and argued in *Copp* are substantially different from the situation involved in Mayer. As Mayer expressly admits in its opening statement, it did not engage in, or compete for, contracts involving interstate highways. (Tr. p. 10) Second, and, for purposes of a Writ of Certiorari, more important, the *Copp* decision grew out of an interlocutory appeal. The *Copp* case involves alleged violations of both the Sherman Act and the Clayton Act in addition to the Robinson-Patman Act. Following a full trial on the merits, the issue preliminarily decided on appeal may be eliminated. In any event, the law is clear that Certiorari, in the usual course, is not granted to review a non-final judgment such as the one involved in *Copp*. Stern and Gressman, *Supreme Court Practice*, §4.19 (4th Ed. 1969). Similarly, certiorari issues primarily not to correct errors in the decision below, but rather to resolve conflicts between the circuit courts and to determine questions of importance. *Id.* at Sec. 4.18.

II.

There Is No Conflict Between This Court's 1954 Decision in Moore v. Mead's Fine Bread Co. and That of The Court Below.

Analysis of this Court's decision in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954) demonstrates there is no conflict between it and the decision of the Court of Appeals for the Seventh Circuit.

In *Moore*, the plaintiff and defendant were competitors in the bakery business. Plaintiff's bakery business was confined to Santa Rosa, New Mexico. Defendant was one of a group of interlocked corporations with bakeries in both Texas and New Mexico which produced and marketed "Mead's Fine Bread". It served one Texas town, Farwell, from one of its New Mexico plants. A price war developed in Santa Rosa, New Mexico and defendant cut its bread prices there by about one-half. Defendant's prices elsewhere, including Farwell, Texas, were not altered. The defendant's price cut in Santa Rosa, New Mexico drove the plaintiff out of business. Plaintiff sued for violation of the Robinson-Patman Act and obtained a judgment which was reversed by the Tenth Circuit because the "injury resulting from the price cutting was to a purely local competitor whose business was in no way related to interstate commerce" (*Id.* at 117). This Court reversed, stating that the requirements of both Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act* were met:

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* Section 3, in relevant part, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States

(footnote continued on next page)

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the interstate transactions and cutting the price in the intrastate sales. *The destruction of a competitor was plainly established, as required by the amended* §2(a) *of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by §3 of the Robinson-Patman Act, was ample.*" (*Id.* at 118) (Emphasis added)

This Court also observed:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants." (*Id.* at 119)

Neither the facts, the holding, nor the dicta of the *Moore* case bears upon this case. The only similar facts are that

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for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (15 U.S.C. §13a)

in each case the plaintiff is a "local merchant" and the defendant is engaged in interstate commerce. The key to understanding *Moore,* which eludes Mayer, is that plaintiff Moore and defendant Mead were competitors and the injury to competition was to the competition between the seller (Mead) and the *seller's* competitor (Moore). This is often termed "primary-line injury"; in such a case, if the defendant is "in commerce" and in that commerce competes with plaintiff, the requirements of §2(a) are met. In the case at hand, as the majority below properly recognized (pp. 5a, 10a, 11a), the only relevant injury is injury to competition between the seller's customer (Mayer) and the *customer's* (Mayer's) competitors. This is called "secondary line injury"; in such a case whether the defendant is "in commerce" is irrelevant unless either or any of the sales complained about to the plaintiff and its competitors is "in commerce". It is undisputed in the case at bar that none of the complained about sales to Mayer or its competitors were "in commerce".

The "in commerce" requirement must, of course, be met both in primary and secondary line competitive situations. How it is met varies with the actual competitive situation. As the majority opinion noted (p. 8a), courts and commentators often distinguish primary line competition from secondary line competition as an aid to rational analysis. It is an aid to analysis of § 2(a) cases under the Robinson-Patman Act which Mayer persistently refuses to use.

It is clear from the foregoing that the Court of Appeals opinion is not in conflict with any facet of this Court's opinion in *Moore* v. *Mead's Fine Bread,* 348 U.S. 115 (1954).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Mayer's Petition for Certiorari should be denied.

Respectfully submitted,

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No. 73-671

In the

Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

SUPPLEMENTAL AND REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-671

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

SUPPLEMENTAL AND REPLY BRIEF

Petitioners file this supplemental and reply brief calling attention to new matter and to the arguments raised in the brief in opposition.

I.

Conflicts Of Decision Have Arisen In The Fifth, Seventh, And Ninth Circuits Since The Filing Of The Petition In This Proceeding.

Within the past 90 days three Courts of Appeal, the Fifth, Seventh, and Ninth Circuits, with a total of 18 judges sitting, have variously opined on the correct interpretation of the commerce provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, under factual circumstances which are legally identical and thus require application of one, rather than several divergent rules of law.

In the instant case, decided on October 1, 1973, Circuit Judges Pell and Sprecher, Mr. Justice Clark dissenting, affirmed judgment N.O.V. on what they regarded as a pure question of law involving the correct statutory interpretation of the commerce prerequisites of Section 2(a) in a secondary line case. The District Court's judgment was affirmed despite the fact (1) that petitioners regularly engaged in paving, resurfacing and repairing interstate, state and municipal roads and highways within Illinois; (2) that they performed purely federal work such as the asphalt paving at the recently constructed Federal Judicial Building in Chicago; and (3) that they have directly, or indirectly through subcontract, engaged in work in Indiana at Nike Base Sites and at the Inland Steelworks near Gary, Indiana (Appendix C).*

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* The relevant pages of the Transcript of Proceedings are attached as Appendix C to this Supplemental and Reply Brief. Petitioners have requested the Clerk of the Seventh Circuit Court of Appeals to certify and transmit the same to this Court.

The majority of the Court below held that petitioners as purchasers of paving aggregates nevertheless were not entitled to relief from General Dynamics' disciminatory pricing practices because they did not sufficiently engage in paving work in competition with contractors in the State of Indiana. It thus concluded that purchasers, such as petitioners, who, because of discriminatory pricing are foreclosed from effectively competing in adjacent states, have no right of redress under Section 2(a).

On October 3, 1973, two days later, the Ninth Circuit reached a diametrically opposite conclusion in *Copp Paving Co.* v. *Gulf Oil Co.*, ... F2d ..... (72-2152, 9th Cir., October 3, 1973) (Attached as Appendix A hereto). Contrary to the Seventh Circuit's majority opinion, the Ninth Circuit held that the jurisdictional prerequisites of the statute were sufficiently met when defendants sold at discriminatory prices asphaltic oil, an ingredient like crushed limestone used in road paving, despite the fact that all such sales took place within California. The Ninth Circuit reached this conclusion on the ground that vehicular highways constitute instrumentalities of commerce and persons selling and purchasing materials for their construction and repair were sufficiently in commerce not only for Sherman Act purposes but for Robinson-Patman purposes as well.

The Ninth Circuit rejected the *En Banc* holding of the Fifth Circuit where 7 of the 12 judges sitting on review concluded that the principles announced by this Court in *Moore* v. *Mead's* were inapplicable in a case involving an intrastate businessman attempting to compete with interstate corporations selling locally at substantially lower prices than outside the state. *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (71-2090, 5th Cir., August 10, 1973; Cert.

Pet. No. 73-688 filed October 24, 1973) (See Appendix B hereto).

These three decisions confront this Court with an astonishing conflict involving majority, concuring, and dissenting opinions of 18 judges, now equally divided in number and expressing divergent views concerning the proper interpretation of the Section 2(a) commerce provisions. This extraordinary situation emphasizes the overwhelming necessity for further expression by this Court regarding the correct interpretation of the commerce provisions of Section 2(a).

In our view these conflicts have resulted because *Moore* v. *Mead's* has been consistently misread by the lower courts to apply only to primary line cases, thus confusing the nomenclature assigned the case with the jurisdictional authority of the federal courts to entertain such actions. Absent further expression by this Court, plaintiffs in Robinson-Patman actions will continue to run afoul of the supposedly peculiar interstate commerce requirements of the Robinson-Patman Act which defendants in recent years have so successfully employed to defeat price discrimination cases.

II.

The Present Action Presents No Factual Dispute Obscuring What The Majority Of The Court Below Has Described As A Pure Matter Of Statutory Interpretation.

The efforts of respondents to create a supposed factual dispute in their brief in opposition emphasizes their effort to denigrate the importance of the question presented and the conflicts below which deserve authoritative resolution by this Court. The majority opinion of the Seventh Circuit, and Mr. Justice Clark's dissent, establishes that

the panel was not at odds on questions of fact but on a question of law. The majority accepted the jury's verdict but nevertheless affirmed judgment N.O.V. based entirely on its first impression interpretation of the commerce provisions of Section 2(a) in a secondary line case. The majority, contrary to respondents' contention, was not prepared to hold that the evidence adduced was insufficient to establish that petitioners attempted, sometimes successfully, to obtain work in Indiana. Mr. Justice Clark makes a pointed note of this fact in his dissent.

We therefore decline to indulge in further debate with respondents concerning the adequacy of the record in this action and are prepared to rely upon the statements of the case set forth in the majority and dissenting opinions. Attempts by respondents to create alleged fact disputes in order to avoid confronting the legal questions presented by certiorari petitions is certainly not a new experience to this Court.

CONCLUSION

For the reasons set forth in our petition and in this supplemental and reply brief, we most respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Court below.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Ninth Circuit

In Re Coordinated Pre-Trial Proceedings In Western Liquid Asphalt Cases
Copp Paving Company, Inc.; Copp Equipment Company, Inc.; and Ernest A. Copp,
Appellants,
vs.
Gulf Oil Company; Union Oil Company of California; Industrial Asphalt, Inc.; Sully-Miller Contracting Company; and Edgington Oil Company,
Appellees.

No. 72-2152

[October 3, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: CARTER and GOODWIN, Circuit Judges, and FERGUSON, District Judge.*

GOODWIN, Judge:

Copp Paving and related antitrust plaintiffs appeal from the dismissal of their claims against certain major oil companies and related defendants for want of jurisdiction.

Plaintiffs process asphaltic concrete and sell and deliver paving materials to construction jobs in California. Except for some imported crude oil which may find its way into

* The Honorable Warren John Ferguson, United States District Judge for the Central District of California, sitting by designation.

their end-product, plaintiffs concede that they process California-produced materials and deliver all of their product to California construction sites.

Defendants Gulf Oil, Union Oil of California, and Edgington Oil Company are producers of asphaltic oil; defendants Industrial Asphalt, Inc., and Sully-Miller Contracting Company are competitors of plaintiffs.

Plaintiffs alleged that defendants had violated §§ 1 and 2 of the Sherman Act by conspiracy in restraint of trade and monopolization, §§ 3 and 7 of the Clayton Act by tying agreements and illegal acquisitions (of Sully-Miller by Union and Industrial Asphalt by Gulf), and § 2(a) of the Robinson-Patman Act by price discrimination.

The district court held, on these facts that the essential element of interstate commerce was missing from the asserted claims based upon various sections of the Sherman, Clayton and Robinson-Patman Acts.

This interlocutory appeal was taken pursuant to 28 U.S.C. § 1292(b) because the threshold question of interstate commerce is critical in the further course of this and related litigation.

The district court held that the production of asphaltic concrete, a substantial amount of which was used to construct interstate highways, was neither "in" nor did it "affect" interstate commerce. We hold that the production of asphalt for use in interstate highways rendered the producers "instrumentalities" of interstate commerce and placed them "in" that commerce as a matter of law.

We start with the proposition that Congress in passing the Sherman Act desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. *United States* v. *Southern-Eastern Underwriter Ass'n.*, 322 U.S. 533, 558-59 (1944); *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517 (9th Cir. 1972) quoting); *United States v. South Florida Asphalt Co.*, 329 F.2d 860, 867 (5th Cir.) (quoting), *cert. denied sub nom.*

H. R. Wright, Inc. v. United States, 379 U.S. 880 (1964); *United States v. Chrysler Corp. Parts Wholesalers, Northwest Region,* 180 F.2d 557, 559 (9th Cir. 1950) (quoting). As the Supreme Court's reading of the commerce clause has broadened over time, so has its interpretation of the jurisdictional scope of the Sherman Act. *See* cases collected at *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 230-31 (1948). Thus, every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely, a holding that conduct is within the reach of Congress' constitutional power for some other purpose is entitled to great weight in a Sherman Act case. *See Rasmussen v. American Dairy Ass'n., supra* at 522, 523 n.13; *Fort Lauderdale v. East Coast Asphalt Corp.,* 329 F.2d 871 (5th Cir. 1964); *De Gorter v. F.T.C.,* 244 F.2d 270 (9th Cir. 1957).

There are, of course, limits to the technique of relying on determinations of the breadth of the commerce power made in one area of congressional regulation in order to determine the breadth of the commerce power in another. First, "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.,* 332 U.S. 218, 231 (1947). *See North American Co. v. SEC,* 327 U.S. 686, 705 (1946); *Overstreet v. North Shore Corp.,* 318 U.S. 125, 128 (1943). Although the power of Congress over commerce is unitary, different evils sought to be regulated may impinge on commerce in different ways and to differing extents, and the power of Congress may vary accordingly. *See McLeod v. Threlkeld,* 319 U.S. 491, 495 (1943). Regulation of business practices through the antitrust laws, for example, may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce.

Second, the Congressional power is not over persons but over practices. It is irrelevant that a person is in

some way engaged in interstate commerce if the practice complained of is in no way related to that commerce. *Yellow Cab Co. of Nevada* v. *Cab Employees, Automotive & Warehousemen, Local 881,* 457 F.2d 1032, 1034 (9th Cir. 1972).

For example, in *United States* v. *Yellow Cab Co.,* 332 U.S. 218 (1947), the Supreme Court held that there was Sherman Act jurisdiction over that portion of a complaint which alleged that the Yellow Cab Company had attempted to monopolize the carrying of passengers between two interstate railroad terminals in Chicago, but held that there was no jurisdiction over the allegations that the same company had violated the Sherman Act in its intracity carriage. And in *Page* v. *Work,* 290 F.2d 323 (9th Cir. 1961), this circuit held that it lacked jurisdiction over a claim by a Los Angeles newspaper that other papers had injured it by diverting some of its legal advertising, a strictly local product, although the newspapers were subject to federal regulation in other ways because they purchased out-of-state newsprint and sold a few papers out of state. While a conspiracy of the newspapers to control the interstate aspects of their business obviously would have been "in" commerce, a conspiracy involving only a strictly local product was only within the power of Congress to control if it "affected" commerce.

A very different function is involved when courts pass on a congressional decision that certain activities affect commerce than when the courts are asked to determine that question for themselves. *Katzenbach* v. *McClung,* 379 U.S. 294, 303-04 (1964). A congressional determination that particular activities affect commerce receives deference in court. *United States* v. *Rodriguez-Camacho,* 468 F.2d 1220 (9th Cir. 1972). However, under the Sherman Act, Congress has left it to the courts to determine whether activities affect interstate commerce. *United States* v. *Darby,* 312 U.S. 100, 120 (1941). Therefore, in reviewing a defendant's conduct for compliance with the Sherman, Clayton, and Robinson-Patman Acts, the court must make its own decision.

In *Overstreet* v. *North Shore Corp.*, 318 U.S. 125 (1943), the Supreme Court held that vehicular roads were instrumentalities of interstate commerce and that persons repairing them were "engaged in commerce" and therefore covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* In *Alstate Construction* v. *Durkin*, 345 U.S. 13 (1953), the Supreme Court extended *Overstreet* to hold that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were also covered by the Act. The test said to be applicable to these cases was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." *Mitchell* v. *S. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955).

We agree with the Fifth Circuit in *Fort Lauderdale* v. *East Coast Asphalt Corp., supra,* that those cases control this one. If highway builders and suppliers are "in" commerce because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization. *See Manderille Island Farms, Inc.* v. *American Sugar Co., supra. See also United States* v. *Shubert,* 348 U.S. 222, 226-27 (1955). Furthermore it is not incidental activities unrelated to the interstate nexus of these businesses which were alleged to have been involved here, but illegal manipulation of the very costs and products which put these same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act. The reach of Congress' commerce power for Sherman Act purposes is no shorter than it is for any other purpose.

Plaintiffs asserted claims under the Clayton and Robinson-Patman Acts as well as under the Sherman Act. Section 3 of the Clayton Act prohibits tying arrangements by "any person engaged in commerce." For there to be jurisdiction under the Clayton Act § 7, both the "acquired" and the "acquiring" companies must be "in

commerce." Robinson-Patman price discrimination jurisdiction depends on the sales involved, as well as the selling company being "in commerce." Defendants argue that the "in commerce" requirements of these statutes are satisfied only by sales which cross state lines. While recognizing that this position has recently been adopted by another circuit with respect to the Robinson-Patman Act, it should be noted that the court there did not consider, because the facts did not require it to, whether this state-line test also applies to sales of a commodity (such as asphalt used in the construction of interstate highways) which is itself closely linked to an instrumentality of interstate commerce. *See Littlejohn* v. *Shell Oil Co.*, 42 U.S.L.W. 2114 (5th Cir. Aug. 10, 1973) (en banc). We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce." To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts. *See United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922). *See also* Conference Rep. H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are "in" commerce but must show that competition was injured before the court has jurisdiction. This is the result of confusing the substantive with the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it.

Plaintiff also appeals the district court's refusal to take pendent jurisdiction of a state antitrust claim against defendants. In view of the complexity of the litigation

and number of parties in these consolidated antitrust actions, the refusal was within the discretion of the district court.

The partial summary judgment in favor of all defendants except the defendant Sully-Miller is reversed, and the cause is remanded for further proceedings consistent with the views expressed herein.

The question of the summary judgment in favor of the defendant Sully-Miller is reserved, as it was not properly before this court under Fed. R. Civ. P. 54(b).

Reversed and remanded.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2090

RALPH H. LITTLEJOHN, JR.,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY, AMERICAN OIL COMPANY and SOONER OIL COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(August 10, 1973)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GODBOLD, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.*

BELL, Circuit Judge: The judgment of the district court dismissing the claim asserted by plaintiff Littlejohn under §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 USCA, §13(a), was reversed by a panel decision of this court. *Littlejohn* v. *Shell Oil Company,* 5 Cir., 1972, 456 F.2d 225. Upon consideration of

* Judges Goldberg Ainsworth, and Dyer did not participate in the consideration of this case.

the case en banc, we vacate the panel decision for reasons to be hereinafter stated.

In sum, we affirm the ruling of the district court that it was without subject matter jurisdiction under the Act absent proof that at least one of each of defendants challenged sales transactions occurred in commerce.[1] We disagree with the panel majority that the interstate sale requirement of the Act may be satisfied by showing the use of profits derived from interstate commerce to underwrite the local price cutting activity. To this extent, we are in agreement with the views of the dissenting member of the panel. We do agree, however, with the majority of the panel that the discovery proceedings were truncated, albeit inadvertently. We thus vacate the judgments of dismissal and remand with direction that plaintiff be allowed a reasonable period of time within which to complete his discovery but on conditions to be stated in Part III, infra.

Plaintiff alleged that he operated an independent gas station in Garland, Texas which is in the northern portion of Dallas County. He also alleged that defendants, through

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[1] Title 15, U.S.C. § 13(a) in pertinent part provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be sustantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." (Emphasis added)

two other stations within one half mile of his station, one selling, respectively, Shell and American gasoline, to other selling the products of American Oil Company, began to sell gasoline to the general public in June 1970 at prices reduced below his selling price although defendants were selling, respectively, Shell and American gasoline, to other dealers in the general Dallas area at normal prices. He alleged that the purpose of defendants in so doing was to drive him out of business and that he was, in fact, forced to close his station because he could not meet the competition engendered by the low prices being charged at the two stations.[2]

The original complaint alleged that Shell and American were marketing gasoline in interstate commerce. There was no allegation, however, that the gasoline delivered to the Shell and American stations in the Dallas area had moved in interstate commerce, or that, with respect to each defendant, at least one sale in interstate commerce was involved. Some months later plaintiff amended his complaint to amplify on his original allegation that profits of defendants Shell and American, derived from their interstate operations, were used by each of them to support their acts of selling gasoline to plaintiff's competitors at the two stations in question at lower prices than were being charged by them to other Shell and American stations in the Dallas area. The amended complaint alleged that Sooner, a Texas corporation with its principal place of business in Oklahoma, was engaged in interstate commerce and was also using its interstate profits to support the price cutting in question.

As distilled, we conclude that, at this point, plaintiff had alleged a classic case of violation of § 2(a) by discrimination in sales at wholesale by sellers to their purchasers who competed with plaintiff, and with resulting injury to his business within the contemplation of § 4 of the Clayton Act. 15 USCA, § 15. See Fn. 3, infra.

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[2] Sooner Oil Company was joined as American's jobber in the Dallas area.

Defendants duly answered. Meanwhile the district court conducted a pre-trial conference and became aware of the possible lack of subject matter jurisdiction in view of the absence of an allegation that, as to each defendant, at least one of the contended discriminatory sales was in interstate commerce. All parties filed briefs on the question. Plaintiff did not allege such interstate sales but relied instead, in the main, on "the use of interstate profits to underwrite" theory expressed in *Moore* v. *Mead's Fine Bread*, 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145. Each defendant filed an affirmative defense on the ground that none of the sales were in interstate commerce and thus the issue was clearly drawn. The district court then granted summary judgment for each of the defendants on the basis of the absence of subject matter jurisdiction.[3]

I.

In reaching decision on the Robinson-Patman Act coverage question which is presented, we must have in mind the difference between the reach of the Sherman Act, 15 USCA, §§ 1-4, and the reach of § 2(a) of the Robinson-Patman Act, 15 USCA, § 13 (a). We pointed out the difference in *Lehrman* v. *Gulf Oil Company*, 5 Cir., 1972, 464 F.2d 26, 36-37, as modified on rehearing. There we quoted from *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 5 Cir., 1969, 412 F.2d 203, 208-209, in saying:

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[3] We put aside the alternative theory of the district court that the plaintiff was not possessed of standing under § 2(a) to sue. The reasoning was that the purpose of § 2(a) was to prevent injury to purchasers from the discriminatory pricing policies of the same seller. This is only one purpose of the Act. It is settled that the Act also grants protection to a competitor whose business is injured by the discriminatory pricing policies. *Utah Pie Company* v. *Continental Baking Company et al.*, 1967, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406; *Moore* v. *Mead's Fine Bread, supra.* See history of Act in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 80 S.Ct. 1267, 4 L.Ed.2d 1385.

"To maintain an action under Section 13(a) the plaintiff must allege and prove, inter alia: (1) that the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that *'either or any of the purchases involved in such discrimination are in commerce';* and (4) that there is likely to be a severe, adverse effect on competition. (Emphasis added.) 15 U.S.C. §13(a). The language of the Act—requiring discriminatory sales to be 'in commerce'—is far narrower in scope than the 'effect on commerce' test applicable under the Sherman Antitrust Act. *See,* e.g., *Foremost Dairies, Inc.* v. *FTC,* 5th Cir. 1965, 348 F.2d 674; *Jones* v. *Metzger Dairies, Inc.,* 5th Cir. 1964, 334 F.2d 919. In appropriate cases, the Sherman Act may be applied to intra-state activities, including retail sales, if they *affect* interstate commerce. *See, e.g., United States* v. *Greater Kansas City Retail Coal Merchants' Ass'n.* W.D. Mo. 1949, 85 F.Supp. 503. Under the terms of section 13(a), however, at least one of the sales alleged to be discriminatory must actually be *in* interstate commerce. *Walker Oil Co.* v. *Hudson Oil Co.,* 5th Cir. 1969, 414 F.2d 588 [Dated July 8, 1969]. In *Hiram Walker, Inc.* v. *A & S Tropical, Inc.,* 5th Cir. 1969, 407 F.2d 4 [Dated January 31, 1969], this Court stated:

> "[I]n order to come within the provisions of the Robinson-Patman Act, the [plaintiff] must demonstrate that the discriminatory sales were 'in commerce.' • • • Thus, the Robinson-Patman Act, is applicable only where the allegedly discriminatory transactions took place in interstate commerce. This is, '• • • at least one of the two transactions which, when compared, generate a discrimination must cross a state line.'

See also Borden Company v. *FTC,* 7th Cir. 1964. 339 F.2d 953; *Willard Dairy Corp.* v. *National Dairy Products Corp.,* 6th Cir. 1962, 309 F.2d 943."

Taking the *Lehrman* opinion and the *Cliff Food Stores* language as a text, it is plain that plaintiff failed to allege the sine qua non of subject matter jurisdiction, that at least one of the sales involved in the alleged discrimination by the defendants, i.e., between the defendants and their respective Dallas gasoline dealers, was in interstate commerce. This much is conceded by plaintiff.[4]

II.

The question remains whether the holding of the Supreme Court in *Moore* v. *Mead's Fine Bread Company*, supra, creates an exception to the statutory requirement that there be at least one discriminatory interstate sale.

It is here that we disagree with plaintiff and with the panel decision. The exception would purportedly rest on the theory of the discriminator using profits from interstate activities to underwrite the losses sustained in driving a competitor out of business through local price-cutting. There is a statement to this effect in *Moore* v. *Meal's Fine Bread*, 348 U.S. at 119-120. The statement has, however, generally been treated as dictum. See e.g., *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, supra, 417 F.2d at 209; *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 6 Cir., 1962, 309 F.2d 943; *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 7 Cir., 1961, 287 F.2d 265; *Food Basket, Inc.* v. *Albertson's Inc.*, 10 Cir., 1967, 383 F.2d 785; *Belliston* v. *Texaco, Inc.*, 10 Cir., 1972, 455 F.2d 175.

This view of the *Moore* v. *Mead's Fine Bread* case follows from the facts of that case which demonstrate that the commerce requirements necessary to establish § 2(a) juris-

[4] It is not conceded that facts which might be discovered would not be sufficient to prove one or more interstate sales and thus support an amendment to the pleadings, or that it was necessary, under notice pleading concepts to allege more than jurisdiction generally under § 2(a) as was done.

diction were satisfied, i.e., (1) the defendant was engaged in commerce; (2) the defendant had discriminated in price between different purchasers of commodities of like grade and quantity; and (3), that one of the purchases involved in such discrimination was in commerce. It is to be noted that proposition numbered (3) was not lacking. This much appears from a statement in the opinion. The price cutting against the competitor was in New Mexico but the discriminator was selling at a higher price in Texas out of its same New Mexico bakery. *Moore* v. *Mead's Fine Bread* is a landmark case in that it explicated the coverage of § 2(a) to protect the competitor of a purchaser who purchased from one seeking to destroy the competitor by price cutting. The case did not, however, alter or extend the specific jurisdictional requirements of § 2(a).[5]

III.

Lastly, we come to the question whether plaintiff is precluded from further opportunity to allege and prove that at least one of the sales to be compared to show discrimination by one or more of the defendants was in interstate commerce. Ordinarily, summary disposition of antitrust cases is fraught with danger. *Cliff Food Stores, Inc.*, supra, 417 F.2d at 105. But, as there, summary judgment may be appropriate where the facts involved in a determinative issue of law are clear, undisputed or unrefuted.

As was pointed out in the panel opinion, majority and dissenting opinions, 456 F.2d at 299, 231-232, plaintiff failed to counter the affidavits of defendants filed in support of their motions so as to make out a fact issue on the interstate sales question. See Rule 56(e), F.R. Civ.P., on the requirement to make a counter showing.

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[5] The panel opinion in *Littlejohn* has attracted the attention of the case note writers. See in support of the panel opinion, 41 Cincinnati L. Rev. 689. Contra, 86 Harv. L. Rev. 765. Dubitante, 26 Vand. L. Rev. 146, 4 St. Mary's L. J. 204.

The problem is procedural. This case was handled procedurally in the latter-day trial concept of notice pleading, discovery, pre-trial conference or conferences, and motions, with a trial to follow only if all else fails. The fatality rate in summarily disposing of litigation in this manner is high indeed, and largely the result of prematurity through inordinate attention to theories of law at a time when the facts have not been fully developed.

Here the legal theories going to jurisdiction were clear. The problem, known to all once issue was joined, was whether there had been interstate sales. The defendants were insistent that there had not been. Somehow, in addition to the usual prolix non-trial proceedings, here the case was bifurcated or at least disjointed to the extent that the court intended throughout to pass on the motions for summary judgment without regard to the ongoing discovery proceedings. Plaintiff's position was that he could not show interstate sales without discovering the facts from defendants to show such sales. He filed requests for documents to this end. He requested that the court forego ruling on the motions pending the completion of discovery. The court did not rule on the request but granted the motions.

The matter is clouded by an out of court agreement recorded in a letter from counsel for American to the other counsel in the case. Under the agreement, discovery was to be postponed pending the ruling on the motions for summary judgment.

There had been a previous letter agreement between the parties to the order of discovery and this agreement was the result of a pre-trial conference in January. Defendants were to complete their discovery during March and April. Plaintiff was not to commence his discovery until March 1 and his request for documents was filed on March 1. On March 19 counsel for Sooner asked for a thirty day extension within which to comply with the request for production of documents on the ground that he was in the

hospital. On March 23, counsel for American wrote the joint letter in question to plaintiff's counsel, counsel for Shell, and counsel for Sooner, stating that they had discussed the matter of producing the documents and, in substance, that the court would proceed to rule on the motions for summary judgment prior to compliance with the request for production. The difficulty for plaintiff is that the last paragraph of the letter stated that no production would be required as to any defendant who was dismissed on motion for summary judgment.[6] Not a single document had been produced. The court granted summary judgment on April 28, 1971.

The question of foreclosing plaintiff by this letter addressed to his counsel is close. Out of an abundance of caution and to prevent a possible injustice, we conclude that Rule 56(f), F.R.Civ.P., is applicable in view of plaintiffs definite position, stated in writing by his counsel to the court, that he could not show interstate sales so as to support subject matter jurisdiction without being able to discover facts from the defendants, and his request to postpone adjudication until he could discover. Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

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[6] "The intent of the Parties to said suit is that a Defendant with respect to which Plaintiff's suit is dismissed upon the Motions now before Judge Hill shall be required to produce nothing and object to nothing. Defendants with respect to which the Plaintiff's suit is not so dismissed shall comply with Plaintiff's Requests for Production of Documents and/or objects to all or part thereof in the manner stated above."

It is true that this representation was not in affidavit from by plaintiff in person but we think that the written representation by his lawyer, an officer of the court, is in the spirit of Rule 56(f) under the circumstances. Form is not to be exalted over fair procedures.

We thus vacate the summary judgments in favor of the defendants but with the following caveat. Shell has contended by affidavit that its gasoline sold in the Dallas area came from Texas refineries. American states that it acquired the gas which it sold to Sooner in Dallas, and in turn sold to Sooner in Texas as jobber. Without more it would appear from these statements that plaintiff will be hard put to show interstate sales but we think that he should be given the opportunity to discover in an effort to make such proof. We hold however that his discovery must be limited in scope as follows: Plaintiff must first amend his complaint to specifically allege that at least one of the sales in question with respect to each defendant was in commerce, and his discovery must then be directed and limited to seeking proof in support of that jurisdictional allegation.

In addition to the alternative holding by the district court that plaintiff had no standing, discussed supra, there was another holding that plaintiff had failed to demonstrate injury. This holding was entirely premature and is vacated. The motions for summary judgment were limited to the subject matter jurisdiction question and, as has been stated, even these motions came on for disposition before plaintiff could have his day in discovery.

AFFIRMED in part; VACATED in part; REMANDED for further proceedings not inconsistent herewith.

BROWN, Chief Judge, concurring in part and dissenting in part:

I join in Judge Simpson's opinion and thereby Part III of Judge Bell's opinion. I would add only that whether the panel could have reversed the case in view of the

prior Fifth Circuit decisions, those decisions are wrong and ought to be specifically overruled on the basis *Moore.*

SIMPSON, Circuit Judge, with whom *BROWN,* Chief Judge, WISDOM, GODBOLD and MORGAN, Circuit Judges, join, concurring in part and dissenting in part:

I adhere to the views and holdings of my opinion for Judge Wisdom and myself, the majority of the panel by which this case was originally decided. *Littlejohn* v. *Shell Company, et al.,* 5 Cir. 1972, 456 F.2d 225.

On that basis, I concur in Part III of Judge Bell's opinion for the en banc court, remanding this case to the district court to permit amendment to the plaintiff-appellant's complaint and to allow him additional discovery from the defendants-appellees for the purpose of developing proof of one or more discriminatory sales in interstate commerce.

On the same basis, viz: the views expressed in my original panel opinion, I respectfully dissent from Parts I and II of the en banc court's opinion by Judge Bell. I would continue to hold that Robinson-Patman[1] subject matter jurisdiction was present by virtue of the allegations of the amended complaint that Shell Oil Company, American Oil Company and Sooner Oil Company used profits from interstate gasoline sales to underwrite discriminatory intrastate price-cutting tactics employed against Littlejohn, the plaintiff-appellant, without requiring any allegations that one or more discriminatory sales were in interstate commerce. As stated in the panel majority opinion, I construe this to be the teaching of *Moore* v. *Mead's Fine Bread Company,* 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145.

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[1] § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

CLARK, Circuit Judge, with whom GEWIN, THORNBERRY and INGRAM, Circuit Judges, join concurring in part and dissenting in part:

I concur without reservation in parts I and II of the majority opinion prepared by Judge Bell for the en banc court. I respectfully dissent from part III both because I believe it faults the district judge for what was a mistake in trial tactics which plaintiff now wants to second guess and because it undercuts Fed.R.Civ.P.56.

Since Judge Coleman's dissent to the panel opinion deals in detail with the actions of counsel and the chronological context into which the procedural question is cast, it is unnecessary to do more here than touch the high spots. Plaintiffs only indication to the court that he needed to pursue discovery to defend against the motions for summary judgment was couched in the vaguest possible terms. It was contained in his initial responsive pleading to the motions and was in this language:

> Plaintiff would *suggest* that consideration by the Court of summary judgment motions at this early stage of the litigation is premature. The facts related to subject matter jurisdiction are certainly *not before the Court in any complete fashion.* Plaintiff has just recently initiated discovery with respect to jurisdictional facts by service on the Defendants of Requests for Production of Documents Related to Subject Matter Jurisdiction pursuant to F.R.C.P. 34. (Emphasis added)

Following this pleading all counsel reached an agreement which was cast into the form of a letter, *a copy of which was delivered to the court.* This letter agreement unqualifiedly provided that no discovery would proceed until after the court's rulings on the then pending motions for summary judgment had been resolved. A copy of

this letter is set out in the margin.[1] Suffice it to say that at least the trial court could reasonably have thought all

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[1]

Re: Agreement as to Time for Objecting to or Complying with Plaintiff's Requests for Production of Documents in CA-3-4195-D Littlejohn v. Shell Oil Company et al.

Gentlemen:

I am writing to set forth our agreement with respect to the Requests for Production of Documents ("Requests") pursuant to Fed. R. Civ. 34 served by the Plaintiff in the above styled and numbered cause upon Defendants Shell Oil Company, The American Oil Company and Sooner Oil Company in the latter part of February, 1971. As you know, all three Defendants in said Cause filed Motions for Summary Judgment and oral motions under Fed. R.Civ. P. 12(b) which are now pending before Judge Hill.

I have discussed the matters hereinafter set forth with each of you with the exception of James C. Hamill, Esq., attorney for Sooner. I have talked to Kenneth Mayfield, Esq., an attorney in Mr. Hamill's firm who is in contact with Mr. Hamill and who has confirmed that Mr. Hamill approves the terms of our agreement and that Sooner will comply therewith. Each of you and I agree to the following procedure as to the timing for objecting to and/or complying with the Requests of the Plaintiff:

1. If the Court overrules any of the three Defendants' Motions for Summary Judgment or motions under Fed. R. Civ. P. 12(b), thus leaving one or more Defendants before the Court in said Cause, then, each of such Defendants still before the Court after such ruling shall:

(a) File in writing any objections such Defendant may have to Plaintiff's Request for Production of Documents served upon it within seven (7) days after the entry of the Court's Order so overruling such Defendant's Motions; and

(b) With thirty (30) days after the entry of the Order so overruling such Defendant's motions, comply with Plaintiff's Request for Produc-

counsel were then requesting that he proceed to rule on the summary judgment motions without awaiting the results of discovery.

Rule 56(f) is precise and unequivocal. A party who opposes a motion for summary judgment but cannot supply the factual basis for his opposition without the aid of discovery must make his problem known to the court by an affidavit. It is unnecessary here to reach the issue as to whether 56(f) mandates that the showing be under oath, since the substance of what was initially disclosed was so equivocal, and since even this equivocation was wholly destroyed by the later agreement to forgo discovery. The plaintiff simply failed to comply with the spirit or the letter of this part of the Rule.

It well may be that a trial court might choose to overlook such a serious procedural shortcoming or a tactical

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[1] (Continued)

tion of Documents with respect to all of the items enumerated in such Request which the Defendant does not object to within seven (7) days (as set forth above) in accordance with the Federal Rules of Civil Procedure.

2. If the Court sustains any of the Defendants' motions, thus dismissing Plaintiff's claims against the same so that such Defendant is no longer before the Court after such ruling, then the Defendant or Defendants so situated shall be under no obligation or duty to comply with Plaintiff's Requests for Production of Documents in any manner.

The intent of the Parties to said suit is that a Defendant with respect to which Plaintiff's suit is dismissed upon the Motions now before Judge Hill shall be required to produce nothing and object to nothing. Defendants with respect to which the Plaintiff's suit is not so dismissed shall comply with Plaintiff's Requests for Production of Documents and/or object to all or part thereof in the manner stated above.

agreement which hindsight has shown to be bad. Clearly, that court could determine that a just presentation of the issues of a particular case required further pursuit of discovery processes notwithstanding the fact that all counsel may agree not to follow such a course. However, no such broad prerogative properly appertains to an appellate court. Subject to rare exceptions calling for supervisory intervention (which does not extend to adjudging that a trial court has abused its discretion when it does no more than honor an agreement of counsel to postpone discovery), this court's function is to correct the errors of judges not lawyers.

I would affirm every aspect of this case.

Appendix C

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Mayer Paving and Asphalt Company, et al.,

Plaintiffs,

v.

General Dynamics Corporation,

Defendant.

No. 69 C 1803

Before the Hon. J. Sam Perry, and a jury,
Monday, March 27, 1972
10:30 a.m.

The trial was resumed pursuant to adjournment.

Present:

Mr. Borst
Mr. O'Brien
Mr. Gladden
Mr. Szwajkowski

Also Present:

Mrs. Lee O. Mayer
Mrs. Sydney R. Mayer
Mr. Arthur L. Lindbloom, Jr.

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The Court: I want to rule correctly on it. Will you bring the jury, please.

(There was a short interruption, after which the following proceedings were had herein, in open court, in the presence and hearing of the jury;)

The Court: Good morning, ladies and gentlemen of the jury. We have been busy on a legal problem and, of course, I had to take care of my regular call also.

You may proceed.
Mr. Borst: Thank you, your Honor.

At this time I would like to call Mr. Sydney R. Mayer, Jr.

The Court: All right.
The Clerk: Will you raise your right hand, please.
(Witness sworn.)

SYDNEY R. MAYER, JR., called as a witness by the plaintiffs herein, having been first duly sworn, was examined and testified as follows:

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Q. Again, with reference to the year 1958, will you tell us the type of paving work that your company was doing?

A. Well, it is the same type that we have always done. It consisted of some municipal work in the way of roads for different towns or counties, state. The majority of our work was parking lots. We would do approximately, maybe, 15 driveways a year, 20 driveways a year; but we would do about 200 other jobs that averaged approximately $10,000 apiece.

Q. Could you give us, based on your connection with the job, a list of some of the work that you did during the 1958-68 period in terms of paving jobs?

A. Yes, sir. I have some notes, but without looking at them, we did resurfacing and repair work at the Illinois Tollways.

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Mr. O'Brien: Your Honor, I am going to object to this on the grounds that we have a lot of data in, that there is substantiation, invoices; if in that stuff that was introduced earlier there is some reference to some of this material, fine. To let the witness turn loose like this, I think unless there is some invoices or something or a demonstration that there aren't any, I object to it. This is more than background.

Mr. Borst: — that the man cannot testify under oath of his own knowledge with respect to paving jobs which have been done by the company.

The Court: He may testify as to his own knowledge, but the best evidence, however, is the records.

Mr. Borst: We are not trying to prove up the contract, your Honor. We are trying to show the type of work that has been done.

The Court: You may cross-examine as to whether he has records and they may be produced if there is impeachment.

Mr. Borst: Certainly Mr. O'Brien had no trouble with driveways and I just wanted to show that they are not all driveways.

The Court: He may answer.

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By The Witness:

A. We paved the Soldiers Field parking lot, which at that time was the largest parking lot in the world. We did that for General Motors before they put on the Powerama Show.

We did the paving at what they call the Federal Building where we are now sitting when it was built. We did the paving at many hospitals, such as Skokie Valley Hospital, Holy Family Hospital, Luthern General Hospital, Michael Reese Hospital, and four or five others that I can think of like Weiss Memorial Hospital.

We also occasionally, not often, but once or twice a year we would get a state job from the State of Illinois from the State Highway Department.

We would do mainly street jobs from the City of Skokie or the City of Niles or Des Plaines or Park Ridge, up in that area. We would do street work.

This is basically the jobs we did.

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Q. During the 1958-68 period, did you have any qualification with the State of Illinois for governmental work?

A. Yes, sir, we were qualified with the State of Illinois every year.

Q. During the '58-'68 period?

A. Yes, sir.

Q. Would you tell us what state qualification means, if you know?

A. State qualification, every spring a contractor, if he wants to do work for the State of Illinois or for any municipality that is using state funds to do work, must fill out what they call a pre-qualification booklet, which is mainly and basically a financial statement of the company for the year before and up to the present time; and it is sent down to the State of Illinois, State Highway Department, where it is very carefully checked and you are given a pre-qualification rating.

Q. What do you mean by rating?

A. This rating is a figure. I will just use an example. If you are given a pre-qualification rating of a million dollars, you may have under contract at any one time up

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to one million dollars in contracts in which state funds are involved. You cannot bid more than that one million dollars until you have done some of the first million dollars worth of work.

If you finish $500,000 worth of work, then you can bid on another $500,000 worth of work, but you cannot have more than a million dollars at one time.

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Q. During the period 1958 to 1968, do you know what qualification rating your company had?

A. Yes. We generally had a qualification rating of between $750,000 and a million and a half dollars. I always tried to get a rating of over a million dollars.

Q. It varied in that range during that period of time?

A. Yes.

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Q. Would you tell us, during the 1958-1968 period, generally the geographic area in which your company transacted business.

Mr. O'Brien: Your Honor, I will object to this. Again, I think there are invoices and data. From this witness, the plaintiff, it seems to me more than generalities are required.

The Court: For the purpose for which it is being offered, general testimony, it may be admitted. Objection overruled.

Mr. Borst: Thank you, your Honor.

The Court: When we are going to the question of damages, you certainly have to have specific items, and the records.

Mr. Borst: Right.

By the Witness:

A. Our company would work from approximately Waukegan, Illinois, we would work out to Joliet and St. Charles, and we would work into Indiana. We would dowork in Indiana.

By Mr. Borst:

Q. Could you describe for us, perhaps, the geographical area somewhat smaller, where the bulk of your work was derived?

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A. The bulk of our work was, I would say, fifty miles from the Loop of Chicago, in a semi-circle.

Q. I show you what has been marked as Plaintiff's Exhibit 36-A-1 through -14 for identification, and ask you if you can identify that document for us.

A. Yes. This was a contract that we had with the United States Government for the paving of athletic facilities at all the Nike sites around the Chicago area. There were three or four in Indiana, and there were four or five in Illinois.

Q. Would you examine the documents and tell us, if you can tell from the examination of the documents, if there is any reference to Indiana.

A. I don't believe there is any mention in here of Indiana work. Let's see.

Yes, there are four sites here on the back page, which are C-45, C-46, C-47 and C-48, which are all in Indiana.

There are five sites in Illinois, C-44, C-49, -51, -54 and -61.

Q. Is that a true and correct copy of Mayer Paving Company with the Army Air Force Central Welfare Fund, or its branch?

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A. Yes, sir.

Q. Where was that document found?

A. It was found in our job file. We have a job file for each job that we do, and this was in the job file for the Nike site work.

Mr. Borst: I offer it in evidence, your Honor.

Mr. O'Brien: Your Honor, I object to this on the ground that there is no evidence of what material was used in the construction of these four combination athletic facilities. This is my first realization that this case had to do with tennis courts. I thought it had to do with paving jobs. I think it is irrelevant and has no connection with Material Service.

The Court: I presume it was paving at the tennis courts?

Mr. Borst: Let me ask the witness the question.

The Court: Ask the witness.

By Mr. Borst:

Q. What type of work did you do on these Nike sites?

A. This was not a tennis court; this was an all-purpose

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athletic area. It was used for six or seven different sporting events, or games.

The Court: Was it paved?

The Witness: It was paved, your Honor, and it was built with a stone base and a surface, just like any other pavement.

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Mr. O'Brien: Your Honor, the mere fact that the defendant here, we call it one, Defendant Material Service, there is no evidence linking or connecting Material Service with this 1958 Indiana Athletic job.

Mr. Borst: Your Honor, I am trying to establish that this man has been doing business in Indiana, and that there are contracts with Indiana, and that there will be stone invoices.

Mr. O'Brien: Until we see some stone invoices, I know of none for this or any other job.

The Court: Objection overruled. It may be admitted.

(The documents previously marked Plaintiffs' Exhibits 36-A-1 through -14 for identification were thereupon received in evidence.)

By Mr. Borst:

Q. I next show you what has been marked as Plaintiffs' Exhibit 36-B for identification, and ask you whether you can identify that document.

A. I believe that this is merely an addition to the other Nike sites contracts. In other words, they decided to add one more Nike site, and it's like an $8,300 extra for doing

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the paving at another Nike site.

Q. By the "other" Nike site contract, you are referring to 36-A?

A. The one we just looked at, yes. This was a $123,000 contract, and this is an authorization for $8,300 to do the paving at the Nike site in Chesterton, Indiana.

Q. Was that an asphalt paving job?

A. Yes, sir.

Mr. Borst: I offer it, your Honor, in evidence, showing plaintiffs' activity.

Mr. O'Brien: Same objection, your Honor.

By Mr. Borst:

Q. What is the date of the document?

A. May 20, 1958.

Q. Whose signature does it bear?

A. My father's. For us it's accepted by my father and it's signed by Colonel Corey, the Corps of Engineers.

Mr. Borst: I offer it ,your Honor.

Mr. O'Brien: Same objection, your Honor. Regarding that this has to do with Material Service, there is no

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showing, no effort to make a showing, and I consider it kind of playing games with the Court, not to even ask his own man where the stone came from. The fact that he did some work in Indiana for the Government is a totally irrelevant bit of data.

Mr. Borst: Your Honor, we have had the quarrel made here—

The Court: He may be able to connect it up. Admitted.

Mr. O'Brien: Your Honor, I submit with the man on the stand, and the documents in front of us, now is the time to do it, unless there is a deliberate attempt to shovel things in here and hope for the best, which I suggest is the case.

(The document previously marked Plaintiffs' Exhibit 36-B for identification, was thereupon received in evidence.)

By Mr. Borst:

Q. I show you Plaintiffs' Exhibit 36-C-1 through -3 for identification, and I ask you whether you can identify that document for us.

A. Yes, sir. This is a contract between Mayer Paving Company and the Power Construction Company for the

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paving of the roads and parking lots at the Inland Steel Research Center in Gary, Indiana—East Chicago, Indiana.

Q. What is the data of that document?

A. April 1966, the 20th of April.

Q. Could you identify the signatures to that contract

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as they appear?

A. One is mine and one is Mr. Al Gorman for Power Construction.

Q. Do you know whether stone was used on that job?

A. Yes, sir.

Q. Do you know where that stone came from?

A. From Material Service.

Mr. O'Brien: Your Honor, I would like to inquire of counsel whether we have any invoices to support that statement of Mr. Mayer. I have been given hundreds.

The Witness: We have every invoice that we have ever bought from Material Service.

The Court: That will be a proper matter for cross examination.

Mr. Borst: I offer Plaintiffs' 36-C-1 through -3 in evidence, your Honor.

Mr. O'Brien: Same objection, your Honor.

The Court: Admitted. Objection overruled.

(Said documents, previously marked Plaintiffs' Exhibits 36-C-1 through 36-C-3 were received in evidence.)

By Mr. Borst:

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Q. I show you what has been marked as Plaintiff Exhibit 36-D, and I ask you if you can identify that document.

A. This is another contract between Mayer Paving Company and the United States Government. This one is for $36,860. It's for the repairing of roads and parking lots at the same Nike sites, and it's dated June 6, 1964.

Q. Is that document signed?

A. This is Donald McKay, contracting officer.

Q. Does it bear your signature?

A. It probably bears my father's. It does.

Q. You are referring to the last page of the document?

A. Yes.

Q. Whose signature is that?

A. My father's.

Q. What is the date of that agreement?

A. The 13th of May, 1964.

Q. Was there asphalt paving involved with that work?

A. Yes, sir.

Q. Do you know whether stone was used?

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A. Yes, sir.

Q. Do you know the source of the stone?

A. Material Service Company.

Mr. O'Brien: Some objection, your Honor.

Mr. Borst: Same offer, your Honor.

The Court: Admitted for the purpose it is offered.

(Said document, previously marked Plaintiffs' Exhibit 36-D, was received in evidence.)

By Mr. Borst:

Q. I show you what have been marked as Plaintiffs' Exhibits 36-E and 36-F, and ask you if you can identify those documents for us.

A. Well, these are part of the same contracts that I just looked at between the United States Government and Mayer Paving for the rehabilitation of roads and parking lots at the Chicago Area defense sites.

Q. Are we merely duplicating?

A. Well, one is the contract, and these are the specifications, and these are the plans, but it's the same job. It is duplicating.

Mr. Borst: I don't to duplicate, your Honor.

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By Mr. Borst:

Q. Mr. Mayer, would you look at the plans, which have been marked as 36-F, and see if you can find any plans there with reference to the Indiana jobs.

A. Yes, there is a plan on that job for repairing the roads on parking lots at Site C-32, which is Porter, Indiana.

Q. If you care to open them up, feel free to do so.

A. There is another one for—excuse me. That's the same one, Porter, Indiana. There are about four in Porter, Indiana. There's another one at Site C-47, which is Hobart, Indiana. There is another one, Site C-46 which is Munster, Indiana.

I believe that's all that were in Indiana on that job.

Mr. Borst: I would ask that 36-F be admitted into evidence to identify the sites of the job, so there is no question that these are Indiana jobs.

Mr. O'Brien: Some objection, your Honor, and the additional objection that it is cumulative.

The Court: Well, it may be cumulative, but if he just put in one or two, there might be a question of whether it was minimal. Objection overruled. It may

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go in.

(The document previously marked Plaintiffs' Exhibit 36-F for identification, was thereupon received in evidence.)

Mr. Borst: On the same basis I offer Plaintiffs' 36-E. The two documents go together, the specifications and the contract.

The Court: Admitted.

(The document previously marked Plaintiffs' Exhibit 36-E for identification, was thereupon received in evidence.)

Q. When you bid for work in Indiana, Mr. Mayer, did you always get it?

Mr. O'Brien: Your Honor, I will object this speculation.

The Court: The question almost answers itself, but he may answer.

By the Witness:

A. No, we don't always get it.

The Court: You do not always get it when you bid in Illinois either, do you?

The Witness: No, sir. We only get about one out of

ten jobs that we bid on.

By Mr. Borst:

Q. I show you what have been marked as Plaintiffs' Exhibits 37-A, 37-B-1 and -2, and 37-C, and ask you to tell us whether those are jobs bid in Indiana by your company.

A. Yes, sir. The first one is a—

Q. You are referring to 37-A?

A. Yes. It's a bid by the Mayer Paving Company on the paving for the United States Post Office of Hammond, Indiana, and we bid about $26,000, and the paving consists of eight-inch base and a three-inch surface.

Q. Did you get the job?

A. No, sir.

The next one is for—

Q. Are you referring to 37-B-1 and -2?

A. Right. It's a proposal to Swift & Company in Western Springs regarding their plant in Hammond, Indiana, and it's for a one-inch base, two layers of three-inch stone—Excuse me. There's a total of 15 inches of crushed stone, and then a three-inch hot plant mix surface.

Q. When was that 37-B-1 and -2 taken?

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A. February 9, 1966.

Q. Did you get that job?

A. No, sir.

Q. All right, then—

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A. Then there is another one.

Q. Are you referring to 37-C?

A. 37-C, dated January 3, 1967, a proposal by the Mayer Paving Company to General Contractors, regarding the tank car repair building for General American Transporatation Corporation, East Chicago, Indiana, and it is for parking lot paving, which is six inches of base and a two-inch surface.

We didn't get that one, either.

Q. Now, I show you what has been previously marked here 35-A-10 in evidence. It is a list of asphalt plants, your Honor; and I ask you if you will go through that list and identify those companies listed thereon with whom you compete for business.

A. Do you want me to read you each one?

Q. No, only those who you regard and whom your company comes into competition for work.

A. We bid against all of these contractors, all of them.

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No. 73-671

In the

Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit.

MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING

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Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 14, 1974. No timely petition for rehearing was filed inasmuch as no grounds for such a petition then existed. But rehearing is sought at this

time because, as it pointed out more fully in the annexed petition for rehearing, an order of this Court granting certiorari in *Gulf Oil Corporation, et al.* v. *Copp Paving Company, Inc. et al.* which raises issues identical to those raised in the instant case was entered by the Court on March 25, 1974.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58(2), the grounds upon which it is based arose after such time. This Court clearly has power, in its discretion and in the interests of justice, to entertain the petition in these circumstances. See *United States* v. *Ohio Power Co.*, 353 U.S. 98; *Gondeck* v. *Pan American World Airways*, 370 U.S. 918.

Respectfully submitted,

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 14, 1974, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. THE GRANT OF CERTIORARI IN GULF OIL CORPORATION UNION OIL COMPANY OF CALIFORNIA, et al. v. COPP PAVING COMPANY, INC. et al., No. 73-1012, October Term, 1973.

On March 25, 1974, following the denial of certiorari in the instant case, this Court granted certiorari in *Gulf Oil Corporation, Union Oil Company of California, et al.* v. *Copp Paving Company, Inc., et al.*, No. 73-1012, October Term, 1973.

The instant case involves substantially the same question of law regarding the commerce requirements under §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), as is involved in *Gulf Oil* v. *Copp*. In both cases, plaintiffs complained of discriminatory pricing in the sale of a principal ingredient used in the construction of roads and highways. In *Copp* the Ninth Circuit held that intrastate sales of such ingredient satisfied the commerce requirements of the Robinson-Patman Act because the highways were instrumentalities of Interstate Commerce. The identical issue was resolved against plaintiff in the instant case. Petitioner filed a Supplemental and Reply Brief in connection with its petition for a writ of certiorari calling the Court's attention to the Ninth Circuit's Opinion in *Copp* and detailing the identity of issues involved in *Copp* and in this action. Petitioner respectfully refers the Court to that Reply wherein the relevance of *Copp* to the instant action is thoroughly discussed.

The identity of issues in the instant case and the *Copp* case amply justifies a reconsideration of the denial of certiorari here. In fact, it would be appropriate for this Court to hear and consider the instant case when it hears and considers the *Copp* case. The appropriateness is underscored, moreover, because of the confusion created

under the Robinson-Patman Act by the conflicting Circuit views as to the commerce requirements under that act expressed in the instant case, *Copp*, and *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir., 1973).

For these reasons, therefore, the denial of certiorari should be reconsidered to the end that this case be heard and resolved simultaneously with the *Copp* case.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay is restricted to the ground specified in Rule 58(2).

/s/ Francis J. McConnell
Francis J. McConnell

Supreme Court, U. S.
FILED
JUN 8 1974
MICHAEL RODAK, JR., CLERK

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BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO FILE AN OUT-OF-TIME PETITION FOR REHEARING

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BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO FILE AN OUT-OF-TIME PETITION FOR REHEARING

On January 14, 1974, the Court denied the petition for certiorari herein. The petition for leave to file an out-of-time petition for rehearing should be denied for the basic reason that petitioners are seeking to present an issue which was not raised in the courts below or even in the

petition for certiorari here; indeed it was not even alluded to until petitioners' Supplemental and Reply Brief in this Court.

The Petition for Rehearing asserts (p. 4) that the Ninth Circuit held in *Copp Paving Co.* v. *Gulf Oil Co.*, 487 F. 2d 202 (1973), cert. granted, March 25, 1974, No. 73-1012, that the commerce requirements of the Robinson-Patman Act were satisfied "because the highways were instrumentalities of Interstate Commerce," and that the "identical issue" was resolved against plaintiffs in the instant case. The petitioners do not point out, because they cannot, where they had previously made such an argument in this litigation. The fact is that no such point was presented by petitioner in the lower courts, and the so-called "identical issue" was never passed upon by them. Thus the *Copp* case did not create a supervening conflict with the decision below.

A. The authorities are legion that a question cannot be presented to this Court unless it was both properly raised below (*e.g. Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 (1958); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 (1970); *Fuller* v. *Oregon*, 42 L.W. 4770, 4773, n. 11 (1974)), and is included in the questions presented in the petition for certiorari (*e.g. Irvine* v. *California*, 347 U.S. 128, 129 (1954); *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-179 (1938); Rule 23 (1)(c)). These principles are essential to the effective functioning of a system of appellate administration.

Both of these principles are applicable here, as we show below.

Furthermore, this case does not fall within the rare exception to the general rules, where parties could not

be expected to anticipate a change in doctrine and therefore have good reason for not raising a question prior to hearing in this Court. *E.g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 320 n. 6 (1971); *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 378-380 n. (1970); *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). The notion that construction of interstate highways may be relevant in determining what is interstate commerce in some context* is not a novel one which petitioners could not have foreseen during the trial and appeal of this case—*if* the facts as to petitioners' business operations, or any major part of them, had made it applicable.

Thus the fact that this Court has granted certiorari in *Copp,* where on a different record the last mentioned point had been presented in the trial court and on the appeal, does not justify petitioners here in first raising the question at this belated time.

B. In the *Copp* case the Court of Appeals held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law". (487 F. 2d at 204.) One of the questions presented to this Court in the *Copp* case challenges that ruling.

This case, insofar as the commerce requirements of the Robinson-Patman Act are concerned, was tried by petitioners, submitted to the jury by the trial judge at their behest, and appealed to the Seventh Circuit on the entirely different theory that the case was similar to and governed by *Moore* v. *Mead's Fine Bread Co.,* 348 U.S.

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* Whether that is sufficient to satisfy the commerce requirements of the Robinson-Patman Act is the issue before the Court in *Copp.*

115 (1954). Indeed *Moore* seems to have been the only case relied upon in the commerce argument in petitioners' two briefs in the Court of Appeals. The *Moore* case involved bread, not a commodity used in or on an instrumentality of commerce such as a highway.

In its memorandum opinion (Petition, 24a, 26a) the District Court described the theory on which this case was tried and went to the jury on the "in commerce" issue:

> "The plaintiff's theory of the case is based on the Supreme Court decision in the case of *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 114 (1954) * * * the court let this case go to the jury on the *Moore* v. *Mead* theory with the idea of obviating a need for a second trial, if it is the judgment of the Court of Appeals that *Moore* controls."

On appeal, petitioners argued to the Seventh Circuit: "We submit (1) that the requisite commerce within the meaning of §2(a) was established in this action under the principles announced in *Moore* v. *Mead's* * * *" (Br. pp. 30-31). The Court of Appeals described petitioners' position as follows (Petition 4a, 486 F. 2d at 766):

> "Mayer Paving contends in reliance upon *Moore* that, since Material Service sold to a number of firms in Indiana at prices lower than those given Mayer Paving, the third commerce requirement has been satisfied."

It is thus clear that in the District Court and the Court of Appeals petitioners presented no argument based upon the interstate nature of the projects they were constructing.

The petition for certiorari again relied exclusively on the *Moore* v. *Mead's* theory upon which petitioners had relied at the trial and on appeal. The company was de-

scribed as an asphalt manufacturer and asphalt paving contractor (p. 4), but the petition did not say anything at all either in the Statement or Argument about whether the company did any *interstate* asphalt highway paving or which pertained to the Robinson-Patman question as to which certiorari has been granted in *Copp*.

In their Supplemental and Reply Brief (pp. 2-4) petitioners tried to convince the Court that there was a conflict between the Ninth and Seventh and Fifth Circuits. Petitioners asserted (p. 3) that the conclusion of the Ninth Circuit in *Copp* was "diametrically opposite" to that of the Seventh Circuit in this case and urged that as a reason for this Court to grant its Petition for Certiorari. However, in their discussion of *Copp*, petitioners did not suggest they met the "in commerce" requirements of the Robinson-Patman Act because some of their asphalt or some of the stone purchased from respondents might have been used on some highway or road which might be described as an instrumentality of commerce. On the contrary, petitioners stuck to their *Moore* v. *Mead's* theory and argued that the "conflicts" they perceived "resulted because *Moore* v. *Mead's* has been consistently misread by the lower courts * * *" (p. 4).

C. Nor was that question explored in the record in this case. Petitioners' Amended Complaint, though referring to their business generally as the paving of roads, highways, driveways, tennis courts and "other such facilities" (App. 14-15), did not claim that any of the facilities or projects were interstate or in interstate commerce, and, as has been shown, none of petitioners' contentions were based on that theory. As a result, although the general nature of petitioners' business was described at the trial, neither party made any effort to introduce

testimony or argument with respect to whether or not the paving projects themselves could be said to be in interstate commerce.

Mr. Mayer testified that "the majority of our work was parking lots", including Soldier's Field, that the company also paved driveways and provided paving for a number of hospitals and the Federal Building in Chicago, that "we would do mainly street jobs from the City of Skokie or the City of Niles or Des Plaines or Park Ridge, up in that area," that "we also did occasionally, not often, but once or twice a year we would get a State job from the State of Illinois from the State Highway Department", and that "we did resurfacing and repair work at the Illinois Tollways" (Tr. 791-793). The "roads and municipal work"—that is the State and local work together—was estimated to amount to between 25 and 35 per cent of the work done (Tr. 794), of which the work for the State seemingly was a small part.

No mention was made of the interstate character of the roads upon which petitioners worked. No point was made of this at any time, nor did petitioners make any effort to establish what proportion of their work related to interstate roads or whether such roads were included in the few jobs obtained from the State.

The record here, therefore, does not establish that any "substantial amount" of petitioners' operation related to interstate highways. On the contrary, most of it clearly involved the paving of parking lots, driveways, athletic facilities and streets in Chicago suburbs.

D. Petitioners rely on the principle that " 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our

rules'. *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99". *Gondeck* v. *Pan American Airways*, 382 U.S. 25, 26-27 (1965). But no interest of justice is properly invoked by an unsuccessful plaintiff in the asphalt paving business who seeks to reopen a case brought to trial and appealed on one theory because another party, who happens also to be in the asphalt paving business, has successfully petitioned this Court for a writ of certiorari in a case decided on a completely different theory.

A threshold inquiry in determining when the interest in finality of litigation must yield to the interests of justice is whether the party seeking to reopen his case can point to an intervening case in which *the same issue* was decided differently, *e.g. Gondeck* v. *Pan American Airways, supra.* And sometimes even getting over that hurdle is not enough. See *Weed* v. *Bilbrey*, 400 U.S. 982 (1970). Petitioners, as we have seen, do not even reach that first hurdle.

The lack of merit in petitioners' motion is underscored by the fact that it amounts to nothing more than a plea that the Court reread Petitioners' Supplemental and Reply Brief filed many months ago. The motion requests that the Court read the attached Petition for Rehearing for a demonstration of why the issues in *Copp* are "identical" to those raised in the instant case (p. 2). The Petition for Rehearing then "respectfully refers the Court" to the Supplemental and Reply Brief where the "relevance of *Copp* to the instant action" is inaccurately said to be "thoroughly discussed" (p. 4). All that the Petition for Rehearing adds is the incorrect statement that the two cases involved identical issues. Obviously, the interest of "finality of litigation" must prevail when

a litigant desiring to reopen a case has nothing new to say. See Sup. Ct. Rule 58(2), (4).

For all of the above reasons respondents respectfully submit that Petitioners' Motion for Leave to File an Out-of-Time Petition for Rehearing should be denied.

Respectfully submitted,

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